89-240

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DENNIS KOHL, by his parents and guardians, Norbert Kohl and Jean Kohl,

Petitioner,

vs.

WOODHAVEN LEARNING CENTER, a corporation, and WOODHAVEN SCHOOL, INC., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Does this Court's decision in *School Board of Nassau County, Florida v. Arline* require the trial court to defer to reasonable medical judgments of public health officials in determining whether proposed accommodations for a contagious individual will eliminate any significant risk of transmitting the disease to others?

(2) Does the clearly erroneous doctrine protect the trial court's decision as to which expert medical testimony to credit in analyzing whether proposed accommodations for a contagious individual will eliminate any significant risk of transmitting the disease to others?

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 10, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 865 F.2d 930 (8th Cir. 1989) and is reprinted in the Appendix hereto at p. A-1.

The opinion of the United States District Court for the Western District of Missouri is reported at 672 F.Supp. 1226 (W.D. Mo. 1987) and is reprinted in the Appendix hereto at p. A-29.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 10, 1989. A timely petition for rehearing with suggestions for rehearing *en banc* was denied on May 12, 1989, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, and the relevant portions of its implementing regulations, 45 C.F.R. §§84.1-84.4, are set forth in the Appendix hereto at p. A-77.

STATEMENT OF THE CASE

Petitioner Dennis Kohl is a carrier of hepatitis B. He is also mentally retarded, bilaterally blind, has limited independent mobility skills, and has in the past exhibited behavior problems such as biting and scratching. In 1983, the Missouri Department of Mental Health referred Kohl to Woodhaven Learning Center and Woodhaven School because they had special programs to serve mentally retarded individuals who were either deaf or blind. On July 16, 1984, he was admitted to the deaf/blind program for evaluation. He resided at Woodhaven Learning Center for more than three months, during which time he was evaluated by both Woodhaven Learning Center and Woodhaven School staff. He was determined to be appropriate for both programs. On October 24, 1984, Kohl was discharged from Woodhaven Learning Center. Although some hope of readmission was held out to his parents over the next year, he was finally denied access to the Woodhaven programs in December of 1985.

Dennis Kohl's parents and legal guardians instituted this action in the United States District Court for the Western District of Missouri, alleging that Woodhaven Learning Center and

Woodhaven School had violated their son's rights under the Rehabilitation Act, 29 U.S.C. §794, by excluding him from their federally assisted programs solely on the basis of his handicap. The case was tried to the district court on May 18-22, 1987. On September 25, 1987, the district court entered an order and memorandum holding that respondents had violated Kohl's rights under Section 504 and permanently enjoining them from excluding him from and denying him the benefits of their residential and day-training programs. The trial court also ordered respondents to submit a proposed plan for the inoculation and screening of staff and unimmunized clients in accordance with its opinion.

Located in Columbia, Missouri, Woodhaven Learning Center provides residential care and daily living skills training to handicapped individuals. At the time of trial, the Learning Center had 179 residents and 300 employees. All of the residents had been screened for hepatitis B and either had been inoculated or were in the process of receiving inoculation for hepatitis B. The residents had not received post-inoculation screening to confirm the development of immunity to hepatitis B. The pre-inoculation screening identified only one hepatitis B carrier among the Learning Center residents, and he had since left the program. Dennis Kohl would have been the only identified carrier at the Learning Center.

The district court found that, at the Learning Center, Dennis Kohl would have been placed in the deaf/blind program located in Parmly Building. Parmly Building is a separate and distinct one-story building on the Woodhaven Learning Center campus. It has its own dining room and kitchen, and only its residents eat there. The dining room, kitchen, and small television room occupy the center of Parmly; on either end are two living areas or wings. Each wing houses 16-20 residents. In the basement, there are two recreation rooms. Each of the two living areas or wings has its own central day-room or common area with double-occupancy bedrooms opening onto the dayroom. Every

two bedrooms share a bath. There is also a laundry room in each wing. The trial court found that 19 people are required to provide 24-hour direct care in a 1:3 staff-to-client ratio on one wing of Parmly Building. The ratio utilizes more staff than the 1:4 ratio required by state licensure. In addition, there are 5 supervisory staff for Parmly Building.

Woodhaven School is a day program which offers educational, pre-vocational, and vocational training to handicapped individuals. Dennis Kohl would have attended the Occupational Resource Center (ORC) operated by Woodhaven School. At the time of trial, the ORC was serving 61 clients, all but 3 of whom had been inoculated against hepatitis B. The School had 1 identified carrier of hepatitis B. In all its programs, the School employed 80 people.

The ORC is partitioned into 5 areas—an office area, work activities center, a break or lunch area, a workbench area, and an area where clients work on wordprocessing equipment. Clients are assigned to specific tables on the production floor which serve as the client's work place. In the work activities center where Dennis Kohl would have received his training, four staff members were providing services to the clients in that area.[1]

The district court found that a limited plan of inoculation and post-inoculation screening could eliminate any significant risk of Kohl's communicating hepatitis B to immunized and unimmunized staff and clients in respondents' programs. In making its findings, the court relied on the expert medical opinion of two physicians, Dr. Robert Perrillo and Dr. Denny Donnell, an official with the Missouri Department of Health. For

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[1] The district court also found that at the time the School excluded Dennis Kohl from its program, a School official had admitted that 3 to 4 people would have been designated to work directly with Dennis Kohl. That figure included a person to fill in for vacations and absences.

Woodhaven Learning Center, Dr. Perrillo recommended inoculating and screening (1) the life skills instructors who would provide daily care and training on the wing of Parmly where Kohl would live, (2) additional staff to fill in during vacations and absences, (3) the supervisory staff in Parmly Building, (4) the LPN assigned to his wing, and (5) the doctor and nurse providing patient care at the Learning Center. He also recommended post-inoculation screening to confirm immunity in the residents who would live on the same wing as Kohl. By taking some simple precautions in handling Kohl's laundry, toilet articles, and waste materials, the janitorial and housekeeping staff in his building would face such a remote risk that inoculation would not be necessary. The other staff spread across the Learning Center campus also would not need inoculation. However, those staff should receive training on hepatitis B and the need to use inoculated staff to handle any emergencies.

For the ORC of Woodhaven School, Dr. Perrillo recommended inoculation and screening the vocational instructors and aides who would actually implement Kohl's training program, additional staff to fill in during vacations and absences, and the monitors who would supervise clients on the bus from the Learning Center to the ORC. He also advised inoculation for the unimmunized clients at the ORC and post-inoculation screening for the clients who would share a worktable with Kohl. In Dr. Perrillo's opinion, the other staff at the ORC—administrators, therapists, instructors, and aides working in other parts of the building—would not require immunization. Because of the physical layout of respondents' programs and the fact that Kohl would be the only carrier at the Learning Center and one of two at the ORC, it was Dr. Perrillo's medical judgment that a limited inoculation and screening program could eliminate any significant risk of transmission.

Dr. Donnell of the Missouri Department of Health offered a similar medical judgment. In his opinion, a "barrier of protection" could be built around Kohl. In the particular cir-

cumstances at the Learning Center where Kohl would be the only identified carrier and the other clients would be inoculated, the "barrier of protection" could be erected by immunizing and screening the staff who would have routine direct contact with Kohl. Inoculating and screening the direct contact staff would provide the same barrier of protection at the ORC. In Dr. Donnell's opinion, that barrier could be maintained even in emergencies by immunizing those supervisors or other staff who would normally serve as back-up in emergencies, by planning Kohl's care to minimize the possibility of an emergency requiring intervention by unimmunized staff, and by using the post-exposure prophylactic hepatitis B immune globulin if an exposure did occur.

The trial court concluded that the "individualized medical findings in this case show that . . . [respondents] can eliminate any significant risk of . . . [Kohl] transmitting hepatitis B by inoculating and screening the staff designed to work directly with him" and by screening to confirm immunity in the residents or clients living or sharing a worktable with him. *See* A-68 of Appendix hereto.

The Eighth Circuit reversed, concluding that the trial court had misapplied *Arline* in two ways. First, it found that the district court commingled the two parts of the "otherwise qualified" test by failing to reach a conclusion as to whether Kohl posed a significant risk to others and focusing instead on consideration of how the risk could be minimized. *See* A-12-13 of Appendix hereto. Secondly, the district court paid unwarranted deference to the opinion of a particular health official as to what accommodations were reasonable when "*Arline* specifically requires deference to public health officials in the ordinary course only when ascertaining the risk to others under the first part of test." *See* A-16 of Appendix hereto. The Eighth Circuit then conducted its own review of the record and concluded that the limited inoculation plan approved by the district court "would expose the Woodhaven staff to an unreasonable risk." *See* A-19 of Appendix hereto.

In dissent, Judge McMillian disagreed with the conclusion that the district court had commingled the two parts of the "otherwise qualified" inquiry. The district court had necessarily found that Kohl posed a significant risk to others; "otherwise it would have been unnecessary to reach the second part of the *Arline* test—that of analyzing whether plaintiff could be reasonably accommodated by Woodhaven." *See* A-24 of Appendix hereto. The reasonableness determination required by *Arline* "involves a judgment by the district court of whether the proposed accommodations can realistically be implemented in such a way as to minimize the risk to an acceptable level given the particular circumstances of the case."

> It is unclear to me how else the recommended accommodations could be analyzed for their reasonableness. What the majority criticizes as a misapplication of the *Arline* test is, in reality, a carefully considered analysis of the various risk-minimizing effect of the accommodations recommended by . . . [Kohl] and his experts.

See A-24 of Appendix hereto.

Judge McMillian also rejected the majority's conclusion that the district court had given undue weight to the testimony of the Missouri Department of Health official. Since there was no indication that the trial court felt compelled to give decisive weight to that testimony, "[w]e need not be concerned . . . that the district court paid any more deference to Dr. Donnell's testimony regarding the reasonableness of the accommodations than it would have had . . . *Arline* . . . remained completely silent on the issue." *See* A-26 of Appendix hereto. It is not the role of the appellate court "to second guess the district court's decision to believe one expert witness over another where there is support in the record for that decision." *See* A-27 of Appendix hereto.

REASONS FOR GRANTING THE WRIT

In *School Board of Nassau County, Florida v. Arline,* 480 U.S. 273, 285, 107 S.Ct. 1123, 1129 (1987) this Court affirmed that the Rehabilitation Act was intended to replace "reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." In keeping with that Congressional purpose, the Court required deference to reasonable medical judgments of public health officials in determining whether individuals afflicted with contagious diseases are "otherwise qualified" within the meaning of Section 504 of the Act. Such deference is required both in determining whether a contagious individual presents a significant risk to others and in determining whether proposed accommodations will eliminate that risk. The Eighth Circuit, however, has misinterpreted *Arline* and announced a rule that would limit any deference to medical judgments solely to the question of whether a contagious individual presents a significant risk of transmitting the disease to others. According to the panel majority below, it is inappropriate for the trial court to defer to reasonable medical judgments on questions of medical fact which arise in the context of the "reasonable accommodation" analysis.

In the face of a national AIDS epidemic and the hysteria it has engendered, the Eighth Circuit's misinterpretation of *Arline* seriously erodes the substantive protections provided by Section 504 to both contagious individuals and the public itself. Reliable medical assessments are just as essential for determining whether reasonable accommodations will eliminate any significant risk of transmission as they are for determining whether that risk is significant in the first place. By insulating the trial court's assessment of proposed accommodations from expert medical testimony, the Eighth Circuit's decision could either undermine the statutory protections for those handicapped by contagious diseases or result in substantial danger to the public health.

At the same time, the Eighth Circuit also disregarded this Court's clear pronouncements on the clearly erroneous doctrine requiring deference to the factual findings and credibility determinations of district courts. This requirement is particularly important where, as here, the district court is in the best position to evaluate the medical testimony of expert witnesses regarding the risks posed by contagious individuals. Even if *Arline* did not require deference to public health officials in determining whether prophylactic measures could eliminate a significant risk, the court below erred in overturning the district court's decision to credit the supported medical testimony of petitioner's two expert witnesses. Furthermore, if the appellate court had correctly concluded that the district court's factual findings resulted from a misapplication of *Arline*, it should have remanded the case to the district court for additional factfinding under the proper "otherwise qualified" standard. Instead, the court below conducted a *de novo* review of the evidence in clear violation of this Court's standard of appellate review under Rule 52 of the Federal Rules of Civil Procedure.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ARLINE* REQUIRING DEFERENCE TO PUBLIC HEALTH OFFICIALS IN DETERMINING BOTH WHETHER A SIGNIFICANT RISK OF TRANSMITTING A CONTAGIOUS DISEASE EXISTS AND WHETHER PROPOSED ACCOMMODATIONS WILL ELIMINATE THAT RISK.

In *Arline*, this Court required deference to public health officials in determining whether individuals suffering from contagious diseases are "otherwise qualified" within the meaning of Section 504 of the Rehabilitation Act. The Court recognized that Section 504 requires reconciling the protection of handicapped individuals from unfounded fears and prejudices with the need to protect the public from significant health and safety risks. To effect that reconciliation in the context of an in-

dividual with a contagious disease, the Court formulated this "otherwise qualified" test:

> A person who poses a significant risk of communicating an infectious disease to others . . . will not be otherwise qualified . . . if reasonable accommodations will not eliminate that risk.

Id. at 287 n.16, 107 S.Ct. at 1131 n.16. That test thus involves a two-part inquiry: (1) does the individual pose a significant risk of communicating an infectious disease in the classroom, workplace, or program and (2) if he does, will accommodation that is reasonable under the existing standards eliminate such a risk. *Id.* at 287 n.16, 17, 107 S.Ct. at 1131 n.16, 17. The Court did not limit the role of reasonable medical judgments to the first step of the "otherwise qualified" test. Rather, it intended such judgments to inform the inquiry as a whole, stating that "courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is *otherwise qualified.*" *Id.* at 286 n.15, 107 S.Ct. at 1130 n.15 (emphasis added). It directed the district court to "defer to the reasonable medical judgments of public health officials" in making findings on the risk presented by the contagious individual and to use "these medical findings" in evaluating whether the individual could be accommodated. *Id.* at 288, 107 S.Ct. at 1131.

In the court below, the panel majority held that "*Arline* requires deference to public health officials in the ordinary course only when ascertaining the risk to others in the first part of the test." See p. A-16 of Appendix hereto. The majority then concluded that the district court had misapplied *Arline* by paying "unwarranted deference to the opinion of a particular health

official as to what accommodations were reasonable."[2] See p. A-12 of Appendix hereto.

This holding by the Eighth Circuit undermines the rationale of *Arline*. In calling for deference to public health officials on questions of medical fact, the Court sought to ensure that Section 504's balance between the right of contagious individuals to be free from discrimination and the right of others to avoid significant health dangers would be based on reasoned, qualified medical assessments of the health risks involved. The need for qualified medical assessments is no less important when considering whether recommended accommodations will eliminate any significant risk to others. Evaluating the safety provided by a treatment, inoculation plan, or other prophylactic measure is uniquely within the expertise of public health officials to whom this Court required deference. Deference to public health officials guarantees that individuals with contagious diseases will not be excluded from work, school, or programs unless and until a court, guided by qualified medical opi-

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[2] The panel majority also thought that the district court misapplied *Arline* by commingling the two parts of the "otherwise qualified" test, "analyzing the nature of the risk to others only after assuming its recommended accommodations were in place." See p. A-12 of Appendix hereto. As the dissent observed, however, the district court only reached the question of reasonable accommodation because it found that Kohl did present a significant risk—"[t]he risk of plaintiff spreading the disease is heightened a great deal by . . . [his] maladaptive behavior." See A-59 of Appendix hereto. Courts finding no significant risk of transmission have not reached the reasonable accommodation issue. *See Chalk v. United States District Court Central District of California,* 840 F.2d 701, 708 n. 11 (9th Cir. 1988) ("where there is a significant risk, *Arline* further requires a court to determine if any reasonable accommodation will eliminate that risk . . . . As no significant risk is posed here, this is not a case involving the standards or limits of accommodation and we do not reach those issues."): *Martinez v. School Board of Hillsborough County, Florida,* 861 F.2d 1502, 1506 (11th Cir. 1988) ("If the risk of transmission supports a finding that Eliana is not 'otherwise qualified' . . ., the court must consider whether reasonable accommodation would make her so.").

nion, has determined that no reasonable prophylactic measure can eliminate the significant risk of harm. Such deference also assures the public that when a court determines that reasonable accommodations will eliminate any significant risk, it has been guided by qualified medical opinion in reaching its conclusion. Neither *Arline* nor common sense support the Eighth Circuit's conclusion that no deference to qualified medical opinion is required when measuring the risk-minimizing effect of a proposed accommodation.

Since it is now settled that individuals suffering from contagious diseases are protected by Section 504, the critical issue is what types of accommodations must be made to allow their participation in employment, education, and other federally funded programs. The Eighth Circuit has structured the accommodation analysis in a manner that will in many cases deny Section 504 protections to individuals handicapped by contagious diseases and may in some cases place the public health at risk.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ESTABLISHED STANDARDS FOR REVIEWING THE FACTUAL FINDINGS OF TRIAL COURTS UNDER RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Eighth Circuit evaded its responsibilities under the clearly erroneous doctrine. In rejecting the limited inoculation plan recommended by plaintiffs' expert witnesses and adopted by the district court, the Eighth Circuit stated that it did "not read *Arline* as requiring courts to give decisive weight to any public health official's testimony simply by virtue of his position." See A-15 of Appendix hereto. However, as the dissent observed, the trial court nowhere indicated that it felt compelled by *Arline* to give decisive, determinative, or dispositive weight to the testimony of Dr. Donnell, the public health official who testified at trial. See A-26 of Appendix hereto. Regardless of whether *Arline* requires deference to public health officials on

proposed accommodation measures, "Rule 52 demands even greater deference to the trial court's findings" when such findings are based on the credibility of witnesses at trial. *Anderson v. Bessemer City,* 470 U.S. 564, 575, 105 S.Ct. 1504, 1512 (1985). If *Arline* had been completely silent on the deference issue, the trial court's decision to credit the testimony of Dr. Donnell and Dr. Perrillo over that of defendants' two experts could "virtually never be clear error." *Anderson v. Bessemer City,* 470 U.S. at 575, 105 S.Ct. at 1512. Therefore, whether or not *Arline* requires the trial court to be guided by qualified medical opinion in evaluating recommended accommodations, it was within the district court's discretion to choose which expert testimony to accept. *Anderson v. Bessemer City,* 470 U.S. at 574, 105 S.Ct. at 1511.

In this case, it is not surprising that the trial court chose to give more weight to the testimony of Dr. Donnell and Dr. Perrillo. Dr. Donnell is the manager of the Missouri Department of Health's section of Epidemiological Services which has statewide responsibilities for communicable disease control. Dr. Donnell's plan to inoculate the staff routinely involved with Kohl's care as well as those supervisors or other staff normally used as backup was consistent with the Department of Health's recommendations on inoculation in mental retardation programs. Furthermore, as Judge McMillian noted in his dissent, "[b]eyond the obvious expertise of Dr. Donnell, his was the most neutral expert testimony presented at trial." See A-27 to Appendix hereto. Dr. Donnell's testimony was also supported by Dr. Robert Perrillo, an associate professor of medicine at Washington University School of Medicine who specializes in hepatitis B, including the epidemiology of the disease, and has authored some fifty medical journal articles, the majority of which concern hepatitis B. Dr. Perrillo based his recommendation for a limited inoculation plan in part on his review of numerous records and facts regarding Kohl and the Woodhaven programs. As permitted by Fed.R.Evid. 703, Dr. Perrillo relied on more than four hundred pages of deposition testimony from

the directors of the Woodhaven programs describing the staffing patterns, staff-patient contact, and physical layout of their programs; hundreds of pages of individual habilitation plans for Kohl containing medical, psychological and behavioral reports on him; and written materials from Dr. Brandon Greene, a psychologist who had conducted observations of both the Woodhaven programs and Kohl in his current placement and had described the staff-client contacts, the physical layout, and the behavior management strategies at Woodhaven.[3]

In contrast, defendants' expert, Dr. Cooperstock, is a pediatrician with a sub-specialty in infectious diseases. His curriculum vitae shows no publications dealing with hepatitis B. He had no first-hand knowledge of Kohl or the Woodhaven facilities. Furthermore, as the panel majority notes, Cooperstock testified that Kohl posed only "slight but definitely increased risk" to unimmunized staff. See A-19 of Appendix hereto. Dr. Pickard, defendants' other expert, is an employee of Woodhaven Learning Center who possesses potential bias in favor of his employer. Dr. Pickard's testimony was internally inconsistent.[4] On cross-examination, he admitted that it is the

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[3] Dr. Perillo's recommendations were not "hypothetical in nature," as the panel majority contended. At trial, the district court sustained plaintiff's objections to characterizations of Perrillo's testimony as "hypothetical," since it was based on facts about Kohl and the Woodhaven programs which he had reviewed and on which experts in the field would reasonably rely. Tr. 3-162.

[4] The Eighth Circuit also cited Dr. Pickard's testimony that Dr. Donnell had called him prior to trial and recommended inoculating the entire Woodhaven staff. See A-16 Appendix hereto. However, the panel majority failed to point out that Dr. Donnell directly contradicted Dr. Pickard's assertion. Dr. Donnell testified that he advised Pickard that "a small number of people could be immunized and that would provide adequate protection for the institution." Tr. 5-7. Again, the decision to credit Dr. Donnell's testimony over that of defendants' employee was clearly within the trial court's discretion and should not have been subjected to second-guessing by the Court of Appeals.

"workers who are in close contact with him [Kohl] who need to be inoculated against Hepatitis B." Tr. 3-33. It was certainly "within the District Court's discretion as factfinder to credit ...[Dr. Donnell's and Dr. Perrillo's] statements over the potentially self-interested testimony of" Dr. Pickard. *Amadeo v. Zant*, ____ U.S. ____, 108 S.Ct. 1771, 1779 (1988).

The Eighth Circuit also believed that the accommodation proposed by Drs. Donnell and Perrillo was somehow in conflict with the inoculation strategy used by the Department of Mental Health (DMH) in its state institutions for the mentally retarded. The district court considered the evidence that DMH offers inoculations to all staff, but the court found no inconsistency between that policy and Dr. Donnell's plan for the Woodhaven programs. Respondents offered only an affidavit and not any testimony at trial from the physician who developed the DMH policy. Even that affidavit contained no opinion as to whether the DMH policy was in anyway applicable to a small community-based facility where all clients had been screened and inoculated and only one carrier was present. Furthermore, Dr. Donnell testified that there was no inconsistency between the DMH policy and his medical conclusion that only staff with direct, extensive, hands-on contact with Kohl as well as back-up staff would need inoculation in the Woodhaven programs. His plan was consistent with the Department of Health's position which conditions the scope of staff inoculation in a mental retardation program on such factors as the number of carriers in the particular population and the likelihood of transmission. The district court therefore acted within its discretion in choosing between two plausible views of the evidence.

Even if the court below believed that the district court had applied improper legal standards in reaching its factual findings, the panel majority erred in making its own findings about whether the proposed accommodation plan would eliminate any significant risk. Such " '[f]actfinding is the basic responsibility

of district courts, rather than appellate courts.' " *Pullman-Standard v. Swint,* 456 U.S. 273, 291, 102 S.Ct. 1781, 1791-92 (1982), *quoting DeMarco v. United States,* 415 U.S. 449, 450n, 94 S.Ct. 1185, 1186n (1974). "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course . . ." *Id.* at 292, 102 S.Ct. at 1792. When the district court's findings are "set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Id.* at 293, 102 S.Ct. at 1792.

Although the Eighth Circuit found that the district court had misinterpreted *Arline,* it failed to remand the case for new factual findings under the correct legal standard. It remanded the case but only after it made its own findings on the central factual issues in the case. The proper procedure would have been for the appellate court to remand the case for additional factfinding under what it determined to be the proper "otherwise qualified" standard. As the Ninth Circuit observed, "[*t*]*he district court is in the best position,* guided by qualified medical opinion, to determine what reasonable procedures . . . will give best assurance . . . that no significant risk of harm will arise."[5]

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[5] The Ninth Circuit's view that such determinations are best left to the district court is supported by the panel majority's attempt to make new findings about the statistical probability of transmission of hepatitis B. As the dissent points out, the majority's calculation that only 3 out of 4 unimmunized staff exposed to Kohl's body fluids would be protected by the post-exposure treatment is statistically incorrect. See A-23 of Appendix hereto. Since the chance of infection upon exposure is only 10-15% and the post-exposure treatment is 75% effective, the 75% figure is not simply 3 out of 4, but rather is 75% of the 10-15% who might become infected. Under that calculation, only 2.5% of the unimmunized staff who were exposed to the virus and received the post-exposure treatment within forty-eight hours would become infected. Only 10% of that 2.5% would even require hospitalization, and only 1% of that 2.5% (or .025%) would suffer fatal liver deterioration. That level of risk is at best theoretical and certainly does not constitute significant risk.

Chalk v. United States District Court, 840 F.2d at 711 (emphasis added). As this Court stated in *Arline*, it is up to the "District Court" to conduct "an individualized inquiry and make appropriate findings of fact" regarding the risk of transmitting a contagious disease. Thus, whatever the proper "otherwise qualified" standard may be, it is the district court which should make the critical factual findings under that standard, particularly when those findings require the court to evaluate the credibility of expert witnesses who testify at trial.

Finally, the Eighth Circuit did not even conclude that the district court had applied an incorrect legal standard in finding that the proposed accommodation would not impose "any undue financial or administrative burden" or require "any fundamental alteration" in the Woodhaven programs. After all, those are the standards which this Court characterized as "established." *School Board v. Arline*, 480 U.S. at 287 and n.17, 107 S.Ct. at 1131 and n.17. Nevertheless, the majority conducted a *de novo* review of the district court's factual findings on those issues as well. Without identifying "the standard of review that it applied" or "discussing its obligations under Rule 52(a)," the majority simply expressed its disagreement with the district court's findings. *Amadeo v. Zant*, 108 S.Ct. at 1777. The Eighth Circuit thus misapprehended and misapplied the clearly erroneous standard.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2627
No. 87-2644

Dennis Kohl, by his parents and guardians,
Norbert and Jean Kohl,
Appellees,

v.

Woodhaven Learning Center, a corporation,
and Woodhaven School, Inc., a corporation,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri.

Submitted: March 14, 1988
Filed: January 10, 1989

Before McMILLIAN, WOLLMAN, and BEAM, Circuit Judges.

WOLLMAN, Circuit Judge.

The Woodhaven Learning Center and Woodhaven School, Inc. (WLC and WS, or collectively Woodhaven) appeal from the district court's[1] order granting Dennis Kohl declaratory and

[1] The Honorable Scott C. Wright, Chief Judge, United States District Court for the Western District of Missouri.

injunctive relief. *See Kohl v. Woodhaven Learning Center,* 672 F.Supp. 1226 (E.D. Mo. 1987). The district court found that Woodhaven had discriminated against Kohl, an active carrier of infectious hepatitis B, and in doing so violated his rights under section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1986) (the Act). *Id.* at 1248. The district court permanently enjoined both institutions from denying Kohl admission and ordered each to submit to the court a proposed plan for inoculating certain of their staff against hepatitis B. *Id.* at 1248-49. We reverse the district court's order granting Kohl injunctive and declaratory relief and remand for further proceedings.

I.

WLC and WS, located in Columbia, Missouri, are not-for-profit corporations organized and existing under the laws of the State of Missouri. Both receive federal funding through various programs. WLC provides residential placement for handicapped individuals and is also a "life-skills facility" that seeks to enable its clients to function more independently. WS is a habilitation facility that provides educational, pre-vocational, and vocational day programs for handicapped individuals. At the time of the trial, WLC had approximately 180 clients and 300 employees; WS had approximately 55-60 employees and 60 clients. Both institutions have a high staff turnover rate.

Kohl is thirty-two years old, mentally retarded, bilaterally blind, and an active carrier of hepatitis B. As a result of his physical and mental impairments, he frequently exhibits maladaptive behavior, including scratching, biting, open masturbation, and self-abuse.

In 1983, the Community Placement Committee of the Missouri Department of Mental Health (DMH) recommended referring Kohl to Woodhaven from Colonial Town, a private hospital where Kohl was then residing and where he had been placed by the DMH. Kohl's parents, along with his DMH case

manager, completed his application to Woodhaven in early 1984. Kohl is an adjudicated incompetent, and his parents are also his legal guardians. In July of 1984, Kohl was admitted to Woodhaven for evaluation.

On September 10, 1984, WLC informed Kohl's DMH case manager by letter that Kohl was "determined to be appropriate" for WLC's program, but that he was being refused admission because WLC would not accept a hepatitis B carrier until all its clients and staff were inoculated and screened. Similarly, although a certified vocational evaluator from WS rated Kohl as a "good candidate" for its programs, Kohl was denied admission to WS. Kohl was discharged from the Woodhaven program on October 26, 1984. WLC informed Kohl's parents twice during the first half of 1985 that Kohl could return when immunization was complete.

Kohl's parents filed this action in his behalf on April 14, 1986, seeking, inter alia, an injunction prohibiting WLC and WS from excluding Kohl.

The district court found that WLC and WS had violated Kohl's rights under section 504 of the Rehabilitation Act, which provides:

> No otherwise qualified individual with handicaps * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

29 U.S.C. § 794 (1988). The district court found that Kohl was an otherwise qualified handicapped individual within the meaning of the Act and that WLC and WS had discriminated against him solely on the basis of his handicap. On the basis of the testimony of Kohl's medical experts, the district court found that WLC and WS could reasonably accommodate Kohl without either significant alteration in their programs or undue cost

by inoculating and screening only the small percentage of their staffs that would regularly come into direct contact with Kohl.

II.

Hepatitis is an infection that primarily affects the liver and is often caused by specific viruses, one of which is the hepatitis "B" virus.[2] The most common symptoms of hepatitis B are an inflammation of the liver and a mild flu-like illness. Hepatitis B also may cause more serious liver disease and liver cancer, with approximately 10 percent of all hepatitis patients requiring hospitalization and less than 1 percent suffering a fatal deterioration of the liver function. In addition, by at least one estimate, 25 percent of those infected will become chronic carriers themselves.[3]

Although the transmission of hepatitis B is not fully comprehended, most medical experts agree that it is transmitted through body fluids, chiefly blood but also through saliva, tears, and seminal fluid, and not by casual contact. Infection occurs when contaminated body fluid comes into contact with breaks in the skin, even breaks too small to be visible to the

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[2] We are indebted to the American Medical Association for its excellent amicus curiae brief, which is the source of much of our information on hepatitis

[3] There is some disagreement as to the long-term effects of hepatitis B. After trial on a similar matter, the District Court of Nebraska reported that 95 percent of all those infected "will fully recover. Of the remaining five percent (5%), the disease will be fatal to ten to twenty percent of these individuals, while the others will develop chronic hepatitis involving slow, gradual liver damage and will die some five to twenty five years later from cirrhosis." *Glover v. Eastern Nebraska Community Office of Retardation*, No. 87-0-830, slip op. at 8 (D. Neb. Mar. 29, 1988). Dr. Michael Cooperstock, an expert medical witness called by Woodhaven, testified that one quarter of all those infected will become chronic carriers and that a certain percentage of these individuals will ultimately die of liver cancer.

human eye, or mucosal surfaces such as the mouth or eyes of an uninfected person. Not every contact with contaminated body fluids will result in infection, but a single exposure involves a 10-15 percent chance that the exposed person will become infected. More prolonged exposure increases the risk, and in the high risk groups—clients of mental institutions, promiscuous homosexual men, and intravenous drug users—the risk is nearly 100 percent.

Hepatitis carriers are not uniformly infectious. A carrier determined to be "e antigen positive" is three to four times more infectious than an "e antigen negative" carrier. (When Kohl first applied to Woodhaven, he tested e antigen positive, but is now e antigen negative.) An alteration in carrier status is not uncommon; however, only 1 percent of all carriers lose their infectiousness entirely each year.

An effective vaccine is available against hepatitis B. In the general population, it is approximately 90 percent effective, increasing to 95-99 percent effective with younger individuals and decreasing below 85 percent effective with individuals who are over the age of fifty, obese, or suffer from Down's Syndrome. The inoculation process requires a series of three shots given over a six-month period. A single booster shot is required every four to five years, or as often as every two years for those with Down's Syndrome. A small percentage of those inoculated will experience side effects of either mild discomfort or low-grade fever. A post-inoculation blood screening test can identify those individuals who have been successfully immunized. An unimmunized individual who is exposed to contaminated fluids may be treated with hepatitis B immune globulin, which, if properly administered within forty-eight hours, will prevent infection in 75 percent of the cases.

The cost of inoculation is currently betwen $150 to $175 per person, the cost of a booster shot approximately $50, and the cost of post-inoculation screening at least $20 to $25 per person.

Immune globulin is also expensive. At the time Kohl applied to Woodhaven, none of the institutions' staff or clients had been inoculated. WLC and WS have now inoculated all or almost all of their clients pursuant to a DMH program initiated in 1985. As of the date of the trial, the clients had not been screened to identify those who failed to develop immunity. The DMH program did not cover staff.

Assuming a total of 360 staff members and a combined cost of $200 to inoculate and screen each individual, to inoculate and screen all the staff at Woodhaven would cost approximately $72,000 initially for the serum and lab tests alone, not including booster shots. Because the yearly staff turnover rate is 75 percent at WLC and 50 percent at WS, each would have an additional yearly cost of $45,000 and $5,000, respectively, to inoculate new staff. The district court proposed inoculating only a small portion of the total Woodhaven staff, at an initial cost of roughly $8,100 and a yearly cost of $5,000 thereafter.

III.

Woodhaven's first argument on appeal is that the doctrine of primary jurisdiction precluded the district court from taking subject matter jurisdiction. *See, e.g., United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956). We disagree. When the DMH referred Kohl to Woodhaven, it performed its essential function and set these events in motion. There was no other issue that had to be resolved in the first instance by an administrative body of "special competence" that if unresolved would deprive the district court of subject matter jurisdiction. *See id.* at 64.[4]

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[4] We agree with the district court that Woodhaven waived its exhaustion-of-administrative-remedies argument.

IV.

Woodhaven's next argument is that its program is not the least restrictive environment for Kohl's care, as required by federal and Missouri law. *See* 42 U.S.C. § 6009(2) (1988); Mo. Rev. Stat. § 633.115 (1988). Woodhaven claims that Kohl's current residence, the Northwest Habilitation Center in St. Louis, where Kohl was transferred on March 10, 1987, is the least restrictive environment for him and can provide care superior to that available at Woodhaven.

When Kohl applied to Woodhaven early 1984, he was residing at Colonial Town, and Northwest Habilitation Center did not yet exist. Kohl's DMH case manager, Nancy Shrewsbury, referred Kohl to Woodhaven in 1983. Therefore, we cannot find clearly erroneous the district court's determination that Woodhaven was the proper residence for Kohl at that time.

An injunction is an equitable remedy shaped to right an ongoing wrong, however, and will not issue if it cannot serve a proper remedial purpose. A change in circumstances can destroy the need for an injunction. *See Toussaint v. McCarthy,* 801 F.2d 1080, 1090 (9th Cir. 1986), *cert. denied,* 107 S. Ct. 2462 (1987). The district court did not address the question of whether Northwest is a less restrictive environment than Woodhaven, nor can we make such a determination from the record. In an affidavit attached to Woodhaven's post-trial motion filed October 9, 1987, Ms. Shrewsbury states that according to an individual habilitation plan drawn up "on or about April 1, 1987," by the DMH agency responsible for community placement, Northwest is the least restrictive environment for Kohl. The affidavit also states that, contrary to Ms. Shrewsbury's testimony at trial, Kohl was not on a referral list for transfer to Woodhaven at the time of trial, although he was in 1983. If Kohl is currently in the least restrictive environment suitable for his care and is no longer being recommended by the DMH for transfer to Woodhaven, an injunction ordering such a transfer

would serve no remedial purpose. On remand, the district court should determine whether Northwest is in fact the least restrictive environment for Kohl. *Cf. Ruffalo v. Civiletti*, 702 F.2d 710, 719 (8th Cir. 1983).

V.

Congress enacted the Rehabilitation Act in order to "develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community." 29 U.S.C. § 701 (1988). The Act provides that institutions receiving federal funds may not discriminate against individuals classified as handicapped solely on the basis of their handicap if the individual is otherwise qualified to participate in the institution's programs. *See* 29 U.S.C. § 794.

Although WLC and WS concede receiving federal financial assistance, they argue that Kohl is not handicapped within the meaning of the Act; that if he is handicapped because of his carrier status, he was not excluded solely for that reason; and that even assuming both of the foregoing, he is not otherwise qualified for the Woodhaven programs. The district court resolved these issues in favor of Kohl.

A. Kohl is Handicapped Within the Meaning of the Act

The statute defines an individual with handicaps as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(8)(B) (1988).

The district court found that hepatitis B is a physical impairment affecting one or more of Kohl's major life functions and

that Kohl has a record of physical impairment. Although Woodhaven strenuously argues, and not without substantial support in the record, that Kohl does not have a physical impairment, we will accept the district court's finding as not clearly erroneous for the purposes of this appeal. Accordingly, we need not address the district court's additional finding that Kohl is handicapped as a result of his carrier status regardless of whether being a carrier causes him physical impairment. *Cf. School Bd. of Nassau County, Florida v. Arline,* 107 S. Ct. 1123, 1128 n.7 (1987).

B. Woodhaven Rejected Kohl Solely Because of His Carrier Status

The district court found that Woodhaven had discriminated against Kohl "solely by reason of" his carrier status. Woodhaven contends that Kohl was excluded for other reasons as well.

On September 10, 1984, James Michael, the assistant executive director of WLC, wrote Kohl's case manager at the DMH that Kohl had been found "appropriate" for the Woodhaven programs, but that WLC could not take him because WS had refused him and WLC would therefore be unable to provide for him during the day. WS rejected Kohl, according to Michael's letter, because its staff had not been inoculated and screened. Other communications from WLC made it clear that Kohl's contagiousness, and not the lack of a day program, was the reason for his exclusion. In May and in July of 1985, WLC informed Kohl's parents that Kohl could return when the immunization of WLC's clients and staff was completed. Charles Brewer, the executive director of WLC, wrote Kohl's parents that it was WLC's "policy" to refuse hepatitis carriers until the staff was inoculated. Kohl's maladaptive behavior was never mentioned in these communications.

WS also acknowledged that Kohl was an appropriate candidate for its program but that he would not be admitted because of his carrier status and his maladaptive behavior. The executive director of WS, in his report for November 21, 1985, stated that "we have requested funding to screen and innoculate [sic] staff expected to work with the active carrier of hepatitis B. The referral (or funding) agency has balked at this request, and as a result, we have not admitted an infectious carrier in our program."

Woodhaven now offers four reasons for rejecting Kohl other than his carrier status: (1) because his maladaptive behavior increased the risk of contagion, (2) the maladaptive behavior itself, (3) the fact that the staff was not immunized, and (4) WLC could not accept Kohl unless WS did. All of these rationales, with the exception of Kohl's maladaptive behavior itself, boil down to Kohl's being a carrier. Kohl's behavior and the non-inoculation of the staff are irrelevant except as they pertain to the risk of infection. WLC's argument that it rejected Kohl because of the lack of a day program is not persuasive, as Kohl was rejected from WS because of his infectiousness, and is also belied by the fact that WLC represented to Kohl's parents that Kohl could return when its staff was immunized.

Woodhaven argues that the presence of a hepatitis B carrier at WS conclusively establishes that Kohl was excluded because of his maladaptive behavior; however, there is no indication that Woodhaven knew that this individual was a carrier when admitted, and in fact the opposite seems to be true. The district court found that because other maladaptive clients were accepted, neither institution had rejected Kohl because of his maladaptive behavior. We find Woodhaven's post-act rationales unpersuasive, and we hold that the district court's finding of exclusively discriminatory intent is not clearly er-

roneous.[5] *See Norcross v. Sneed,* 755 F.2d 113, 119 (8th Cir. 1985).

C. Otherwise Qualified-Reasonable Accommodation

The district court found that Kohl was otherwise qualified for the Woodhaven programs and that Woodhaven could reasonably accommodate him. The two concepts are related: if a handicapped individual cannot be reasonably accommodated, then he cannot be otherwise qualified. "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Arline,* 107 S. Ct. at 1131 n.16.

Arline sets out a two-part test for determining whether a contagious individual is otherwise qualified. First, the district court must analyze the following four factors to assess the threat to others: " '(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long the carrier is infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.' " *Arline,* 107 S. Ct. at 1131 (citation omitted). In evaluating these factors, "courts normally should defer to the reasonable medical judgments of public health officials." *Id.*

If the individual is found to pose a significant risk to others, the second part of the test is whether the accommodation necessary to eliminate that risk is reasonable. *Id.* "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, or 'requires a fund-

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[5] If on remand the district court determines that Kohl cannot be reasonably accommodated and therefore is not otherwise qualified for the Woodhaven programs, *see Arline,* 107 S. Ct. at 1131 n.16, this finding is rendered nugatory. *See Pushkin v. Regents of Univ. of Colorado,* 658 F.2d 1372, 1385 (10th Cir. 1981).

amental alteration in the nature of [the defendant's] program.' " *Id.* at 1131 n.17 (quoting *Southeastern Community College v. Davis,* 442 U.S. 397, 412 (1979). It is "for the court to evaluate, in light of these medical findings," whether the recipient of federal funds can reasonably accommodate the individual with handicaps. *Id.* at 1131.

We conclude that the district court misapplied the *Arline* test in two ways. First, the district court commingled the two parts of the test, analyzing the nature of the risk to others only after assuming its recommended accommodations were in place. Second, the district court paid unwarranted deference to the opinion of a particular health official as to what accommodations were reasonable.

The nature of the risk in the present case is the possibility of infection with hepatitis B through the transfer of body fluids. Not every contact with contaminated body fluids will result in infection, but on the scale of infectious diseases devised by the American Public Health Association, ranging from 1 (polio) to 5 (common cold), with 1 being the most infectious, hepatitis is designated as a Class 2A disease, akin to typhoid fever and diptheria. A single exposure to hepatitis B contaminated blood on a mucous membrane or small break in the skin results in a 10-15 percent chance of infection, as compared with a less than 1 percent chance of infection of AIDS for the same exposure. *See* Brief of the American Medical Association as Amicus Curiae, at 2-4.

The duration of carrier status varies, as does the level of infectiousness, but many carriers remain contagious throughout their lifetimes, with only 1 percent losing their carrier status per year. *See Kohl,* 672 F. Supp. at 1242. Although Kohl's infectiousness has decreased from e antigen positive to e antigen negative, he is still a carrier, and was in fact more highly contagious when Woodhaven rejected him than he is now.

The severity of the risk is grave, for although the majority of those infected will suffer only flu-like symptoms, ten percent

will require hospitalization, and a very few, less than one percent of those infected, will suffer a fatal deterioration of the liver function. These figures may be underinclusive. *See Glover v. Eastern Nebraska Community Office of Retardation,* No. 87-0-830, slip op. at 8 (D. Neb. Mar. 29, 1988) (the disease will be fatal to one percent or less, but another approximately four percent will die within 5 to 25 years of cirrhosis of the liver).

The probability that the disease will be transmitted and cause varying degree of harm must be considered high. Because of Kohl's maladaptive behavior, there is a substantial likelihood that others could come into contact with his body fluids. Kohl averages several acts of aggression against the staff and several acts of self abuse per day. On at least one occasion during Kohl's evaluation at Woodhaven, staff members came into contact with Kohl's blood after he inflicted an injury upon himself.

The district court did not reach a conclusion as to whether Kohl posed a significant risk to others, focusing instead on considerations of how the risk could be minimized. The district court found that a combination of the vaccine that generally confers immunity to roughly 90 percent of those inoculated, the screening test to determine who has been successfully immunized, and the post-exposure prohylaxis hepatitis B immune globulin would "provide a means for eliminating virtually any potential harm to third parties posed by [Kohl]."

Discussing the probability that clients or staff will be infected, the fourth factor of the *Arline* test, the district court noted that by the time of the trial all the clients at WLC had been or were being inoculated, as had all but three clients of WS. The district court recommended that those three clients be inoculated and that all the clients be screened.

To protect the staff from the threat of infection, the district court's plan called for creating "a barrier of protection" around Kohl by inoculating and screening those staff members who would routinely deal with Kohl and by also immunizing a

small number of supervisors or other staff who would function as "backup in an emergency situation." Unimmunized staff would be trained to avoid giving assistance to Kohl in emergencies in favor of allowing an immunized staff member to do so. The janitorial and housekeeping staff could minimize, but not eliminate, their risk of infection by wearing gloves, and Kohl's laundry could be marked to alert laundry workers to wear gloves when handling it. One expert also suggested immunizing the monitors on the bus Kohl would ride from WLC to WS. The district court concluded that such a plan would "eliminate any significant risk of [Kohl's] transmitting hepatitis B."

Concluding its reasonable accommodation analysis, the district court found that the cost of its plan would be reasonable. The district court foresaw an initial cost to WLC of $6,500 and an annual cost of $4,400 a year thereafter. The district court found that this cost was not an "undue financial burden" on WLC in light of its $4 million annual budget. Similarly, the district court found an initial cost of $1,600 and yearly costs of $400 to $600 to Woodhaven insignificant in light of its $1.1 million budget.

Before discussing the merits of the district court's plan, it should first be pointed out that the plan's costs are deceptively low. The district court considered only the cost of the medical supplies and lab tests necessary to inoculate and screen the direct contact and backup staff. Many obvious costs were not considered, including the cost of inoculating and screening additional staff to replace the ten percent who do not develop immunity, the cost of screening the clients, the cost of administering the shots and tests, and the cost of the regular booster shots. Because of the long time lag necessary to immunize new staff (seven and one-half to nine months), the district court underestimated the number of backups required to insure adequate emergency protection in the situation in which a staff

member is replaced.[6] These omissions are far from insubstantial.

Courts are prohibited from requiring a fundamental alteration in a defendant's program to accommodate an individual. *See Arline,* 107 S. Ct. at 1131 n.17; *Davis,* 442 U.S. at 412. We conclude that the district court minimized the administrative burden of reassigning away from Kohl those staff members and clients who do not develop immunity and gave no weight to the degree Woodhaven's programs would be disrupted by its plan.

In formulating its accommodation plan, the district court relied almost entirely on the testimony of Dr. Denny Donnell, with some corroboration from Dr. Robert Perrillo. Dr. Donnell is the manager of the section of Epidemiology Services, Missouri Department of Health. Dr. Perrillo is a private physician called as an expert by Kohl. The district court stated that *Arline* requires that " 'courts normally should defer to the reasonable medical judgments of public health officials.' *Arline,* 107 S. Ct. at 1131. The public health official who testified in this case was Dr. Donnell." *Kohl,* 672 F. Supp. at 1244. We find that the question of deference cannot be so easily resolved. We do not read *Arline* as requiring courts to give decisive weight to any public health official's testimony simply by virtue of his position. The official must have particular knowledge relevant to the issue in question.

Dr. Donnell is an expert on communicable disease generally, but he has never visited Woodhaven, was entirely unfamiliar

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[6] In an affidavit attached to Woodhaven's post-trial motion, Charles Brewer, executive director of WLC, stated that the district court omitted from its calculations a number of staff members who would have direct care responsibility for Kohl and that it is customary to pay staff a 33 percent pay hike for undertaking undesirable assignments. The district court declined to consider this evidence since it could have been presented at trial. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2582 (1971).

with its programs, and has never examined Kohl. His testimony that it would be adequate to inoculate the direct contact staff alone was hypothetical. As the issue of a limited inoculation plan was central to the trial and was sharply contested, Dr. Donnell's testimony could hardly be given determinative weight. Other considerations also dictate against finding Dr. Donnell's testimony controlling. In deciding section 504 cases, courts may be called upon to balance deference to health authorities with the deference due to the reasonable judgments of the administrators most familiar with the program under examination. *See Strathie v. Dep't of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir. 1981). Dr. Clarence Pickard, the medical director at WLC, challenged Dr. Donnell's proposal as unsafe. Dr. Pickard also testified that Dr. Donnell, calling from the Department of Health prior to trial, had recommended that Dr. Pickard have the entire Woodhaven staff inoculated.

The evidence also revealed that a second public health authority has taken a position directly contrary to Dr. Donnell's. The DMH itself requires that all staff in state-run mental facilities, including secretaries and other noncontact personnel, must be inoculated or sign a release in order to continue working. The Missouri Legislature found the need to inoculate all state staff so urgent that it authorized an "emergency appropriation" of more than $1 million to accomplish the task. *See Kohl*, 672 F. Supp. at 1231. Although state mental facilities commonly have a substantially greater number of clients with hepatitis than Woodhaven would have, the DMH's policy must be given some consideration, for it is hard to conceive of a rationale that would justify requiring more protection for state mental health staff than their private counterparts.

Furthermore, *Arline* specifically requires deference to public health officials in the ordinary course only when ascertaining the risk to others under the first part of the test. *See Arline*, 107 S. Ct. at 1131. In the "next step," it "is for the court to

evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry." *Id.; see also Chalk v. United States District Court,* 840 F.2d 701, 711 (9th Cir. 1988) (the "district court is in the best position, guided by qualified medical opinion, to determine what reasonable procedures, * * * will best give assurance * * * that no significant risk of harm will arise"). The question whether all significant risks have been eliminated is not a purely medical one. Although medical testimony may be helpful, the court cannot remove itself from this inquiry. The court is not relegated to merely determining whether the financial and administrative cost is reasonable, but also must be satisfied that the significant risks to others are removed.

Dr. Donnell acknowledged that the DMH's general policy was that all staff at institutions for the mentally retarded should be inoculated, but that under certain circumstances, particularly when there was only one carrier at the institution, inoculation of only the direct contact staff could suffice. Dr. Donnell testified, "Well, in a general way, the extent to which vaccine would be necessary or appropriate would be to protect those people * * * who would have the continuous and direct contact with the carrier" and that such a measure "for that set of people * * * would provide protection for them." Others beside the direct contact staff faced the possibility of a single exposure during some unforeseen crisis, Dr. Donnell explained, but a single exposure entails a smaller risk of infection.

Dr. Donnell also testified that a carrier who exhibited aggressive maladaptive behavior such as Kohl's would pose a greater risk than a calm or passive carrier. When asked what his recommendation was in the situation where all staff members are trained and required to respond to any emergency, as the staffs at Woodhaven are, Dr. Donnell testified that any staff member who might have to respond to an emergency should be inoculated. Alternatively, Dr. Donnell suggested that staff

members be trained not to assist in the handling of Kohl in emergencies.

Dr. Perrillo, who admitted that he was unfamiliar with Woodhaven and Kohl and who based his recommendations on assumptions about both, supported the possibility of a limited inoculation plan. He also testified that "it's ideal for you to vaccinate all individuals who work at [a mental institution]," but that "I know why we're here today, and it's somewhat a question of cost." Dr. Perrillo agreed with Dr. Donnell that unimmunized staff would have to be trained not to assist in the handling of Kohl, because anyone who might be required to give emergency aid to Kohl "[n]eeds to be [inoculated]."

Dr. Perrillo also pointed out several pitfalls with the limited inoculation plan. Because the entire inoculation process can take up to nine months—three shots over six months and a screening test six to twelve weeks later—and because the staff turnover rate at WLC is 75 percent per year and 50 percent per year at WS, additional staff beyond direct contacts and backups would have to be inoculated to insure that there was always adequate backup. In order to avoid immunizing new staff who might leave either before or shortly after becoming immune, Dr. Perrillo recommended that no new staff be assigned to Kohl's building until they indicated or demonstrated that they intended to work at Woodhaven for a substantial period of time. Dr. Perrillo stated that it would be impossible to immunize short-term replacements.

An additional problem would be that of arranging for the continuing treatment of those clients who failed to develop immunity. Dr. Perrillo cautioned that these clients, who could number 15 percent or more of the entire client population, as it includes a significant number of individuals with Down's Syndrome, should be isolated from Kohl. Dr. Perrillo acknowledged that isolation is "sometimes difficult to do in a classroom environment."

Testifying for Woodhaven were Dr. Michael Cooperstock and Dr. Clarence Pickard. Dr. Cooperstock testified that Kohl's presence at Woodhaven would pose "slight but definitely increased" risk to all staff and not just the direct contact staff, and indicated that anyone who might be called to come into contact with Kohl during an emergency faced a heightened risk of infection. Dr. Cooperstock also testified that 10 percent of those infected will require hospitalization. Dr. Pickard testified that Kohl endangered all unimmunized staff. Dr. Pickard, who has served as the medical director at WLC since 1986, stated that he would recommend that any employee trained to respond to an emergency be inoculated, as well as any employee who could reasonably be expected to come into contact with Kohl.

After reviewing the record, we are left with a firm conviction that the limited inoculation plan would expose the Woodhaven staff to an unreasonable risk. Both Woodhaven facilities are open and allow clients full access to all areas of their facilities. At WLC there are many large group activities including choir, dances, bible study, religious services, and recreation. The clients have free access to the nursing station, gymnasium, and swimming pool, as well as the administrative offices. WLC also gathers all clients and staff together twice a week for meetings. At WS the clients freely intermingle during breaks from classes. In this setting, it is impossible to isolate Kohl or to insure that unimmunized staff will not be required to give assistance in emergencies involving Kohl. The fact that there is another hepatitis B carrier at WS does not establish that Kohl could be reasonably accommodated, because the other carrier is much less severely retarded and exhibits no maladaptive behavior. Even attempting to isolate Kohl would be a fundamental alteration in Woodhaven's open program and would deny Kohl one of the most important therapeutic benefits of the Woodhaven program, that of social interaction with others. In addition to the fact that instructing unimmunized staff not to assist in

emergencies involving Kohl is conceivably dangerous, a Woodhaven official testified that a staff member's refusal to give reasonable care to a client in a situation amounting to neglect of that client could result in a reveiw of Woodhaven's license. Although Kohl's behavior had improved measurably after his time at Woodhaven, he was still given to daily acts of aggression against the staff and daily acts of self-abuse, in one instance inflicting a serious injury to his own eye, causing staff members who assisted him to come into direct contact with his blood. Given the open environment at Woodhaven and Kohl's unpredictable and violent nature, it is inevitable that unimmunized staff would eventually be exposed to a significant risk of infection.

We cannot consider a 10-15 percent chance of infection so small as to be insignificant. This is particularly true since the immune globulin post-exposure treatment is only 75 percent effective under the best circumstances. Protecting 3 out of 4 unimmunized staff members is not equivalent to "eliminat[ing] any significant risk," as the district court found. This risk is unacceptable. *See Arline,* 107 S. Ct. at 1131 n.16 ("[a] person who poses a significant risk of communicating an infectious disease will not be otherwise qualified for his or her job if reasonable accommodations will not eliminate that risk"); *Davis,* 442 U.S. at 409 (in implementing the mandate of section 504 the courts must ensure the safety of third parties); *Doe,* 666 F.2d at 775 (a recipient of federal funds "need not dispense with reasonable precautions * * * for safe participation * * * in its activities"). Enforcement of section 504 cannot entail exposing third parties to significant risks. *See Arline,* 107 S. Ct. at 1131 n.16 ("[t]he Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom"); *Doe,* 666 F.2d at 777 ("[i]t would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others"). On the other hand, the medical testimony indicates that inoculating the staff who could reasonably come into con-

tact with Kohl or who would be required to assist him should an emergency arise would eliminate any significant risk of infection. *See Chalk,* 840 F.2d 708 (plaintiff permitted to reassume teaching position when the "overwhelming consensus of medical opinion" was that he posed no significant risk to others).

In the light of the contradiction between Dr. Donnell's proposal and the DMH's procedures, the hypothetical nature of Dr. Donnell's proposed plan, and the unanimity of opinion among all the medical experts, including Dr. Donnell, that it was preferable to inoculate all the staff that could reasonably come into contact with Kohl, we conclude that the district court erred in finding that limited inoculation would eliminate all significant risk. Therefore, regardless of the cost of the plan, which was seriously understated, a program of limited inoculation cannot reasonably accommodate Kohl. The evidence and testimony established that to eliminate all significant risk of infection, all staff who reasonably could come into contact with Kohl should be inoculated.

The district court's order granting injunctive and declaratory relief is reversed, and the case is remanded to the district court for further proceedings consistent with the views set forth in this opinion.[7]

In view of our diposition of the appeal, we need not consider the cross-appeal on the question of attorneys' fees and costs.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

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[7] We call the district court's attention to consideration of the Civil Rights Restoration Act of 1987 as it pertains to accommodation of individuals handicapped by contagious diseases. *See, e.g.*, The Intent of the Harkin/Hunphrey Amendment to S. 557, the Civil Rights Restoration Act, 134 Cong. Rec. S1738 (March 2, 1988) (statement of Sen. Harkin).

I concur in Part III (jurisdiction), Part IV (appropriate residence), Part V-A (Kohl is handicapped within the meaning of the Rehabilitation Act), and Part V-B (Kohl was rejected for placement at Woodhaven solely because of his status as a carrier of Hepatitis B). For the reasons discussed below, I respectfully dissent from the majority decision in part V-C that Kohl is not an "otherwise qualified handicapped individual" within the meaning of § 504 of the Rehabilitation Act (Act), 29 U.S.C. § 794. I also dissent from that portion of the majority opinion affirming the district court's denial of attorneys' fees to Kohl.

The majority criticizes the district court for "commingling" the two parts of the test set forth in *School Boa.. v. Arline*, 107 S. Ct. 1123, 1131 (1987) (*Arline*). I disagree with this characterization of the district court's analysis. The district court carefully considered the four risk factors set out in *Arline*, alone and in conjunction with the accommodations suggested by plaintiff. *See Kohl v. Woodhaven Learning Center*, 672 F. Supp. 1226, 1230-34, 1241-48 (W.D. Mo. 1987) (*Kohl*).

As is required by *Arline*, the district court made a detailed factual inquiry into the risk to others posed by plaintiff because of the nature of his disease, *i.e.*, the manner in which Hepatitis B is transmitted; the duration of the risk of transmission; the severity of the risk if the disease is transmitted; and the probability that the disease will be transmitted as well as the probability that varying degrees of harm will be caused if it is transmitted. *Id* These factual findings are entitled to great deference on appeal and should be affirmed unless they are clearly erroneous. Fed. R. Civ. P. 52(a). The majority restates the factual findings of the district court and then complains that the district court did not conclude that plaintiff posed a significant risk to others. The majority contends that the district court

only analyzed the risk in terms of the accommodations proposed by plaintiff.[1]

A close reading of the case that the majority relies upon in support of its view that the risk posed by plaintiff has been understated, *Glover v. Eastern Nebraska Community Office of Retardation,* 686 F. Supp. 243 (D. Neb. 1988) (*Glover*), lends support to the district court's conclusion that the proposed accommodations are reasonable. *Glover* held that a policy requiring mandatory screening of direct care employees for the Hepatitis B virus is not justified in light of the fourth amendment proscription against unreasonable searches and seizures. The district court reached this result despite the risk posed to mentally retarded individuals by carriers of the Hepatitis B virus. *Id.* at 251. Despite its recognition that there was a danger of maladaptive behavior such as scratching or biting which creates a risk of transmission, the district court specifically found that there were prophylactic measures available sufficient to prevent the spread of Hepatitis B such as vaccine and immune globulin as well as behavior management and passive restraint skills which were practiced by the staff. *Id.* at 245-46, 247.

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[1] The majority concludes that "protecting three out of four unimmunized staff members is not equivalent to 'eliminating any significant risk.' " Slip op. at 20. This may be a misinterpretation of the statistics on the reliability of the post-exposure treatment. The chance of infection upon exposure is ten to fifteen percent, and the post-exposure treatment is seventy-five percent effective against infection. The seventy-five percent figure should be applied only to those ten to fifteen percent who might become infected without any protection. Under this analysis, only 2.5 percent of the unimmunized staff members who were exposed to the virus and who received the post-exposure immune globulin within 48 hours of exposure would become infected. An even smaller percent would develop a serious form of the disease. Therefore, the district court was correct in holding that the "barrier of protection" proposed by plaintiff and his experts would eliminate any significant risk of transmission of the virus to unimmunized staff members. *Kohl,* 672 F. Supp. at 1243.

Here, the district court necessarily found that plaintiff posed a significant risk to third persons; otherwise it would have been unnecessary to reach the second part of the *Arline* test—that of analyzing whether plaintiff could be reasonably accommodated by Woodhaven. The question of reasonableness involves a judgment by the district court of whether the proposed accommodations can realistically be implemented in such a way as to minimize the risk to an acceptable level given the particular circumstances of the case. *Arline,* 107 S. Ct. at 1131 & n.17.

In making the reasonableness determination required by *Arline,* the district court did consider the nature of the risk to others after assuming that the recommended accommodations were in place. *Kohl,* 672 F. Supp. at 1241-48. For example, the district court considered the lessening in severity and frequency of plaintiff's aggressive behaviors while residing at Woodhaven in determining the risk of transmission of Hepatitis B to others. From this, the district court concluded that the proposed accommodations would adequately protect third parties from infection. *Id.* at 1242. It is unclear to me how else the recommended accommodations could be analyzed for their reasonableness. What the majority criticizes as a misapplication of the *Arline* test is, in reality, a carefully considered analysis of the various risk factors in this particular case as well as the risk-minimizing effect of the accommodations recommended by plaintiff and his experts.

In holding that the district court incorrectly found that the recommended accommodations are reasonable, the majority over-emphasizes the cost to Woodhaven of implementing the proposals. It is true that an accommodation is not reasonable "if it either imposes 'undue financial and administrative burdens' on a grantee or requires 'a fundamental alteration in the nature of [the] program.' " *Arline,* 107 S. Ct. at 1131 n.17 (quoting *Southeastern Community College v. Davis,* 442 U.S. 397, 410, 412 (1979). However, cost is but *one* consideration of many in the reasonable accommodation analysis. *See Nelson v.*

Thornburgh, 567 F. Supp. 369, 381 (E.D. Pa. 1983) ("preventing discrimination against the handicapped may mean that recipients of federal funds will have to expend funds of their own."), *aff'd,* 732 F.2d 146 (3d Cir. 1984), *cert. denied,* 469 U.S. 1188 (1985).

Here, the district court found that the proposed accommodations would neither require a fundamental alteration in the nature of Woodhaven's program nor impose upon Woodhaven undue administrative or financial burdens. *Kohl,* 672 F. Supp. at 1246. It specifically found that the cost to Woodhaven of implementing the proposed accommodations would be minimal, even taking into account the high staff turnover rate at Woodhaven. The district court also found that by Woodhaven's own admission, one of its primary reasons for not admitting plaintiff to its program was the cost of inoculating its staff. *Id.* at 1237-38. Far too much emphasis is placed on the cost factor, both in the analysis of the majority and in the arguments made by Woodhaven.[2] The result is an unbalanced equation in which the rights of plaintiff are given far too little weight and the costs to Woodhaven of implementing the proposed accommodations are given far too much.

The majority also holds that the district court gave undue weight to the testimony of one of plaintiff's expert witnesses, Dr. Denny Donnell, Section Manager of Epidemiology for the Missouri Department of Health. The majority reasons that *Arline* instructs the trier of fact to "defer to the reasonable medical judgments of public health officials" only in the first step of the analysis and that the district court was therefore in error when it relied heavily on Dr. Donnell's testimony in analyzing the reasonableness of the proposed accommodations. *Arline,* 107 S. Ct. at 1131.

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[2] In assessing the cost to Woodhaven of implementing the proposed accommodations, the majority relies in part on evidence not properly before this court. *See* majority opinion at 15 n.6.

It is for the trier of fact to judge the credibility of a witness and to choose to believe all, none, or part of his or her testimony. *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985) (*Bessemer City*); *Hylton v. John Deere Co.*, 802 F.2d 1011, 1014 (8th Cir. 1986); Fed. R. Civ. P. 52(a). This proposition is so basic, it hardly needs citation.

Here, the district court clearly recognized that *Arline* instructs the trier of fact to defer to the judgments of public health officials when it is making the detailed factual findings that comprise the first part of the *Arline* test. We know that the district court recognized the distinction because it quoted from *Arline* to that effect. *Kohl,* 672 F. Supp. at 1244. We need not be concerned, then, that the district court paid any more deference to Dr. Donnell's testimony regarding the reasonableness of the proposed accommodations than it would have had the *Arline* court remained completely silent on this issue. I do not read the opinion of the district court to mean that it believed it was compelled to give decisive weight to Dr. Donnell's testimony.

However, the fact that the district court gave great weight to Dr. Donnell's testimony should come as no surprise. He is an expert in the field of epidemiology, a field specifically concerned with the control of the spread of disease in the population. Further, Dr. Donnell's testimony is supported by that of Dr. Robert Perillo, another expert who testified for plaintiff. Dr. Perillo is an associate professor of medicine at Washington University Medical School in St. Louis, Missouri. He specializes in research in Hepatitis B, including the epidemiology of the disease. These two experts testified that, given the nature of the risk posed by plaintiff to other persons in the context of being housed in a residential facility for the mentally retarded, a "barrier of protection" could be built around plaintiff, primarily by inoculating those staff members who would come into contact with him.[3] *Kohl,* 672 F. Supp. at 1244.

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[3] Inoculation of all Woodhaven clients is at least near completion. *Kohl,* 672 F. Supp. at 1243-44.

Dr. Donnell also testified that the Missouri Department of Health guidelines for the vaccination of staff working in facilities for the mentally retarded are "conditionally stated." The two factors cited by Dr. Donnell which affect whether an institution should expect to vaccinate its entire staff are the number of carriers of Hepatitis B in the institutional population and the likelihood of transmission by those carriers. The plaintiff would be the only carrier of Hepatitis B at Woodhaven. *Kohl,* 672 F. Supp. at 1232. Dr. Donnell's testimony that a "barrier of protection could be built around plaintiff is consistent with the Department of Health guidelines.

The majority observes that the testimony of plaintiff's experts is based only on hypothetical questions and that they are unfamiliar with plaintiff and the physical environment at Woodhaven. A careful review of Dr. Perillo's testimony reveals, however, that his answers were in response to hypothetical questions that referred to the very specific conditions at Woodhaven. A properly phrased hypothetical question should result in an answer that validly reflects the reality of the situation. *See* Fed. R. Evid. 703 and comment.

The district court gave greater weight to the testimony of plaintiff's experts, one of whom is the Missouri state official in charge of the control of communicable diseases within the state. Beyond the obvious expertise possessed by Dr. Donnell, his was the most neutral expert testimony presented at trial. Woodhaven's expert witness, upon whom the majority would have the district court rely, is a Woodhaven employee who possesses the potential for bias in favor of his employer. It is not for this court to second guess the district court's decision to believe one expert witness over another where there is support in the record for that decision. *Bessemer City,* 470 U.S. at 575.

The district court made a detailed analysis of the risk posed by plaintiff and carefully considered whether the proposed accommodations are reasonable in terms of the degree of protec-

tion they would provide to others, the disruption they may cause to Woodhaven's programs, and the cost of implementing them. The district court concluded that because the proposed accommodations are reasonable, plaintiff is an "otherwise qualified handicapped individual" within the meaning of § 504 of the Act. I would affirm that portion of the district court's opinion.

On cross-appeal, I would reverse the district court's decision not to award attorneys' fees to plaintiff under 29 U.S.C. § 794a(b). One who successfully obtains court-ordered injunctive relief in a civil rights case "should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968). The cost of compliance with court-ordered injunctive relief is not a "special circumstance" which justifies denial of attorneys' fees to a prevailing plaintiff. *Robinson v. Kimbrough,* 652 F.2d 458, 467 (5th Cir. 1981). Nor is the financial condition of the defendant. *Entertainment Concepts, Inc. v. Maciejewski,* 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981). Accordingly, I would remand this case to the district court with directions to make findings on reasonable attorneys' fees and costs and to award same to plaintiff.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4234-CV-C-5

DENNIS KOHL, by his parents and guardians,
Norbert Kohl and Jean Kohl,

Plaintiff,

vs.

WOODHAVEN LEARNING CENTER, a corporation, and
WOODHAVEN SCHOOL, INC., a corporation,

Defendants.

ORDER AND MEMORANDUM

(Filed: September 25, 1987)

Plaintiff has instituted this action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, against defendants Woodhaven Learning Center and Woodhaven School, Inc. Plaintiff is a thirty-one-year-old man who is mentally retarded, bilaterally blind, exhibits behavioral problems which include scratching and biting, and has been diagnosed as an active carrier of heaptitis B.

Beginning in October, 1983, plaintiff's parents and legal guardians sought residential placement and training services for plaintiff at Woodhaven School and Woodhaven Learning Center. Plaintiff contends that although he was found to be appropriate for residential and day training programs at Woodhaven Learning Center and Woodhaven School, plaintiff was not accepted for permanent placement in either program because of his condition as an active carrier of hepatitis B.

From May 18, 1987 through May 22, 1987, a bench trial was held before this Court. Based on the following findings of facts

and conclusions of law, the Court concludes that defendants Woodhaven Learning Center and Woodhaven School, Inc. have violated plaintiff's rights under Section 504 of the Rehabilitation Act, and that plaintiff is entitled to declaratory and injunctive relief.[1]

I. Findings of Fact

1. Plaintiff Dennis Kohl is a citizen of the United States who presently resides at Northwest Habilitation Center of the

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[1] Defendants attempt to raise, for the first time in their Joint Post-trial Brief, that this Court lacks jurisdiction in this case based on the doctrine of primary jurisdiction, and plaintiff's failure to exhaust state and federal administrative remedies. However, for a number of fundamental reasons, defendants' jurisdictional challenge must be denied.

First, the essence of defendants' jurisdictional challenge is that since plaintiff has failed to exhaust state and federal administrative remedies, then this Court lacks subject matter jurisdiction. However, since defendants have failed to raise such a defense in their answers, in their motions to dismiss or in their motions for summary judgment, then defendants' belated post-trial jurisdictional challenge is barred by the doctrines of waiver and estoppel. *See Zipes v. Trans World Airlines,* 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (Held that timely compliance with the administrative deadlines in Title VII was not a jurisdictional prerequisite to suit in federal court, but a requirement subject to waiver, estoppel, equitable tolling, and so on); *Williams v. Casey,* 657 F.Supp. 921 (S.D.N.Y. 1987) (Noncompliance with exhaustion requirements does not deprive district court of subject matter jurisdiction).

Second, as noted by plaintiff in his reply brief, there are no state and federal administrative remedies which plaintiff and his parents could have exhausted in this case. *See e.g.* Mo.Rev.Stat. § 633.120.31 (1986) (which makes clear that the Department of Mental Health cannot force the head of a *private* mental retardation facility to admit a client referred by a regional center). *See also Miener v. State of Missouri,* 673 F.2d 969, 978 (8th Cir.), *cert. denied* 459 U.S. 909, 103 S.Ct. 2151 (1982) (Exhaustion of federal remedies is not a prerequisite to § 504 suits which do not involve federal government employment discrimination since administrative remedies are of little avail to the individual plaintiff).

Missouri Department of Mental Health ("DMH") located in St. Louis County, Missouri. He is thirty-two-years old. Plaintiff brings this action by and through his parents and legal guardians, Norbert Kohl and Jean Kohl.

2. Defendant Woodhaven Learning Center is a not-for-profit corporation organized and existing under the laws of the State of Missouri. Woodhaven Learning Center is a life-skills and living quarters facility which provides residential placement to handicapped individuals. It is located in Columbia, Missouri.

3. Defendant Woodhaven School, Inc. is a not-for-profit corporation organized and existing under the laws of the State of Missouri. Woodhaven School, Inc. is a habilitation facility which provies educatonal, pre-vocational, and vocational day programs for handicapped individuals. It is located in Columbia, Missouri.

4. This Court has jurisdiction under 28 U.S.C. § 1331 and 1343(a)(4) in that plaintiff's claim arises under 29 U.S.C. § 794. Venue is proper in this Court under 28 U.S.C. § 1391(b).

5. Plaintiff is mentally retarded, bilaterally blind, and has been diagnosed as an active carrier of hepatitis B. As part of his physical and mental impairments, plaintiff exhibits behavior problems which include scratching and biting.

6. Plaintiff's physical and mental impairments substantially limit his ability to care for himself, perform manual tasks, see, speak, learn and work.

7. In 1983, the community placement committee of the DMH recommended referring plaintiff to Woodhaven Learning Center and Woodhaven School because they served blind individuals, and plaintiff, as a blind retarded individual, had needs which the Department's private vendors in the St. Louis area could not meet.

8. In the October 5, 1983 individual habilitation plan (IHP) for plaintiff, prepared by his DMH case manager and staff from

Colonial Town where he was then residing, the deaf/blind and day programs of Woodhaven Learning Center and Woodhaven School were identified as the least restrictive environment for plaintiff.

9. In October of 1983, Mike McCarthy, an employee of Woodhaven School, Inc., observed plaintiff at Colonial Town for the purpose of determining whether plaintiff was appropriate for referral to Woodhaven School, Inc.

10. Plaintiff's Department of Mental Health case manager informed Mike McCarthy that plaintiff had hepatitis B and provided McCarthy with a report on hepatitis prepared by Dr. Mohammed Ahkter of the DMH.

11. Between October 11, 1983 and February 7, 1984, plaintiff's parents and his Regional Center case manager completed the process of applying on plaintiff's behalf to Woodhaven Learning Center. The records provided to Woodhaven Learning Center as part of his application identified him as a hepatitis B carrier and as exhibiting some maladaptive behavior.

12. On or about March 27, 1984, the Admissions and Discharge Committee of Woodhaven Learning Center placed plaintiff on a waiting list for evaluation for residential placement and daily skills training in the deaf/blind program located in the Parmly Building at Woodhaven Learning Center.

13. A representative of Woodhaven School, Inc. sat on the Admissions and Discharge Committee which placed plaintiff on the waiting list for Woodhaven Learning Center.

14. The nurse for Woodhaven Learning Center also sat on the Admissions and Discharge Committee which placed plaintiff on the waiting list for Woodhaven Learning Center.

15. On July 10, 1984, Woodhaven Learning Center informed Mr. and Mrs. Kohl that plaintiff would be admitted to the deaf/blind program at Woodhaven for evaluation beginning July 16, 1984.

16. On or about July 24, 1984, the Woodhaven Learning Center staff designed an IHP for plaintiff in which the objectives were independent dressing, independent bathing, independent wall-trailing to the dining room, and reducing his maladaptive behaviors by 50% by August of 1985.

17. On or about August 16-18, 1984, a certified vocational evaluator of Woodhaven School, Inc. evaluated plaintiff for services at the Occupational Resource Center of Woodhaven School, Inc.

18. The summary of the vocational evaluation on plaintiff by Woodhaven School, Inc. stated:

> "Dennis' lack of formal education or vocational program has resulted in a very severe deficit in the knowledge of, or skills required for a work setting. His willingness to allow physical manipulation and his cooperation with the instructor during the vocational evaluaton, however, makes him a good candidate for vocational intervention."

19. On September 10, 1984, James Michael, the Assistant Executive Director of Woodhaven Learning Center, wrote Nancy Shrewsbury, the DMH case manager for plaintiff, stating that plaintiff "was determined to be appropriate for residential as well as vocational programs offered by Woodhaven Learning Center and the Occupational Resource Center" of Woodhaven School, Inc. In the same letter, however, Michael set an October 26, 1984 dismissal date for plaintiff from Woodhaven Learning Center because the Occupational Resource Center would not accept plaintiff in its day program without a screening and inoculation of its clients and staff for hepatitis B.

20. On September 10, 1984, Woodhaven Learning Center dismissed plaintiff because the Occupational Resource Center of Woodhaven School, Inc. refused to provide a day program for him without a screening and inoculation program for its staff.

21. In May, and again July, 1985, Woodhaven Learning Center staff informed Mr. and Mrs. Kohl that plaintiff could return to the Learning Center when the immunization of residents was complete.

22. On December 4, 1985, the Executive Director of Woodhaven Learning Center refused to readmit plaintiff, stating that:

> "On July 24, 1985, we contacted you regarding Dennis' readmission to Woodhaven Learning Center. At that time there was no day program available for him. We, Woodhaven Learning Center, no longer have the immuned staff in our employee [sic] to work directly with your son.
>
> "It will be our policy not to accept hepatitis carriers in our residential population until a time when funds are made available to innoculate [sic] contact staff."

The only reason given at that time for refusing to allow plaintiff to return to Woodhaven Learning Center was his status as an active carrier of hepatitis B.

22. Now and in 1985, both Woodhaven Learning Center and the Occupational Resource Center of Woodhaven School, Inc. accepted clients with behavior management problems.

23. Woodhaven Learning Center and Woodhaven School were concerned with plaintiff's maladaptive behaviors only because they increased the risk of his transmitting hepatitis B.

24. On August 1, 1985, Woodhaven School, Inc. adopted a policy on hepatitis B which stated:

> "Policy: It is the policy of Woodhaven School, Inc. not to discriminate against students/clients that have been referred for services solely on the basis of being an active carrier of Hepatitis B.
>
> "Comments:
> 1. If a student/client has been determined appropriate for services at Woodhaven School, Inc. following a com-

prehensive evaluation and an interdisciplinary team meeting, and if that student/client is an active carrier of Hepatitis B *and* determined to exhibit aggressive or maladaptive behaviors that would present a clear and present danger of transmission of the disease to those staff in direct contact with him/her, Woodhaven School, Inc. will require the referring agency and/or funding source to provide necessary reimbursement for protecting the staff designated to work directly with that student/client.

2. The reimbursement associated with taking additional and necessary precautions for serving such students, is above the regular costs established for services at Woodhaven School, Inc.

3. The reimbursement will be for costs associated with the screening and inoculation of all those staff and volunteers designated to serve the student/client."

25. On November 21, 1985, the Executive Director's Report for Woodhaven School, Inc. stated:

"As reported earlier, we have requested funding to screen and innoculate [sic] staff expected to work with the active carrier of hepatitis B. The referral (or funding) agency has balked at this request, and as a result, we have not admitted an infectious carrier into our program."

26. The sole reason for excluding plaintiff from Woodhaven School, Inc. was his diagnosis as an active carrier of hepatitis B.

27. Hepatitis B is an inflammation of the liver due to infection with the hepatitis B virus. In most cases, the inflammaton results in a flu-like illness so mild that it will not be brought to the attention of a physician. In other cases, hepatitis B can cause liver disease and liver cancer. The fatality rate for reported cases of the disease is less than 1%.

28. Some 5-10% of hepatitis B cases can develop chronic infection or carrier status. A carrier is an individual who tests

positive for surface antigen for longer than three to four months. Individuals who have an active case of hepatitis B and carriers who are chronically infected can transmit the disease to susceptible individuals.

29. Hepatitis B is transmitted by body fluid to body fluid — by blood, saliva, and other body fluids and secretions. It is transmitted by the body fluids of the carrier entering the bloodstream of another individual through a scratch, open wound, or cut. A microscopic skin lesion is sufficient to allow the transmission of the disease, and a very small amount of secretion is all that is necessary. The virus can exist at room temperature, and can remain on physical surfaces for long periods of time.

30. A great majority of people receiving a known exposure to the body fluid of an affected individual will not come down with hepatitis B.

31. Hepatitis B is not spread by casual contact or association with a carrier. It is not transmitted through the air by a cough or sneeze.

32. Carriers of hepatitis B may, but do not necessarily, remain carriers all of their lives. Approximately 1% of carriers spontaneously lose their carrier status each year, in which case all evidence of infection disappears and the infection is in permanent remission.

33. Carriers of hepatitis B do not have the same level of infectiousness. A carrier's level of infectiousness can be measured by a blood test known as the antigen test. A carrier who tests e antigen positive is 3- to 4-fold more infectious than a carrier who test e antigen negative. Between 5 and 10% of all carriers per year will go from e antigen positive to e antigen negative.

34. In tests administered from July, 1983 through November, 1985, plaintiff was e antigen positive. In September of 1986, plaintiff tested e antigen negative. Again, in May of 1987,

plaintiff was e antigen negative, meaning that he is now less infectious.

35. The mentally retarded and other institutionalized individuals have been recognized as a group with a higher level of hepatitis B infection, carrier status and evidence of past infection than those in the general population. Thus, institutionalized settings present the greatest opportunity for the disease to be transmitted.

36. There is a highly effective pre-exposure vaccine for hepatitis B. In a general range of the population, it confers immunity at a 85-95% rate. Among young and middle-aged individuals, the vaccine is 95-99% effective.

37. The side effects or risks associated with the vaccine are minimal. Less than 5% of those vaccinated will develop a low-grade fever and some irritation at the point of injection. There is no risk of picking up any other infectious agent through the vaccine.

38. There is a post-inoculation blood test which shows whether an inoculated individual has developed a sufficient level of protective antibody to fight off the hepatitis B virus. When individuals have developed sufficient levels of protective antibody, they will not get hepatitis B even from a bite or scratch of a hepatitis B carrier.

39. There is also an effective post-exposure prophylaxis which can be administered to unimmunized individuals who experience a significant exposure to the hepatitis B virus. The product is known as hepatitis B immune globulin.

40. The per person cost of inoculation was $100 in 1985 and currently is about $150 to $175. The per person cost of post-inoculation screening is currently $20 to $25.

41. As of the date of trial, Woodhaven Learning Center had 179 clients, of which 153 are clients of DMH. Woodhaven Learning Center has approximately 300 employees.

42. During the year 1987, Woodhaven School, Inc. has employed approximately 80 individuals. Currently, there are approximately 61 clients being served by Woodhaven School, Inc. at its Occupational Resource Center.

43. DMH, as a matter of policy, requires all employees of its habilitation and residential centers, irrespective of whether they; had direct care responsibilities of the clients, to either be screened and inoculated for protection from hepatitis B, or to sign a waiver of liability. In addition, all DMH clients are screened and inoculated for hepatitis B at DMH's expense. In 1983, DMH requested and received a $1.2 million emergency appropriation from the Missouri Legislature to cover expenses of the screening and inoculation of DMH employees and clients. Since that time, this function has been deemed so important to protect staff and clients that money for this screening and inoculation has been included as part of DMH's core budget.

44. Woodhaven Learning Center participated in the screening and inoculation programs that DMH implemented for its clients in private placements. At Woodhaven Learning Center, the screening was done in February of 1985, at which time 162 DMH clients and 43 other residents were screened. Only one other carrier of hepatitis B was identified, and he has since left Woodhaven Learning Center. The immunizations at Woodhaven Learning Center were begun in July, 1985 and completed in January, 1986.

45. At Woodhaven Learning Center, all of the clients have been or will be vaccinated against hepatitis B. As of April 10, 1987, 168 residents at Woodhaven Learning Center had been inoculated and 16 had not. By the time of trial, the center had begun inocuation of the remaining 16 residents.

46. At the present time, plaintiff would be the only identified carrier of hepatitis B at Woodhaven Learning Center.

47. At the present time, 3 of 61 clients at the Occupational Resource Center do not have immunity to hepatitis B.

48. Woodhaven School, Inc. currently has one client who is an identified carrier of hepatitis B.

49. It would cost Woodhaven Learning Center approximately $45,000 to buy enough serum to inoculate all 300 of its employees. Additionally, the cost for screening for the same 300 employees would be approximately $7,500.

50. It would cost Woodhaven School, Inc. approximately $12,000 to inoculate all of its employees. Additionally, the cost for screening these employees would be approximately $2,000.

51. Since the annual rate of turnover of employees was approximately 75% at Woodhaven Learning Center and approximately 50% with respect to aides at Woodhaven School, Inc., then an additional expenditure would be required each year for the inoculation of new employees.

52. According to Dr. Donnell, a public health official who heads up the Missouri Department of Health's Section of Epidemiological Services, which is responsible for the control of hepatitis B and other communicable diseases, the Department of Health's recommendation on inoculation of staff in programs for the mentally retarded is conditionally stated so that no program would expect that their entire staff should be immunized. The number of staff who should be vaccinated depends on such factors as whether there are carriers in the population, the number of carriers, and the likelihood of transmission.

53. In the individual circumstances presented by this case where plaintiff would be the only identified carrier at Woodhaven Learning Center, it was Dr. Donnell's opinion that a barrier of protection could be built between plaintiff and unimmunized staff by vaccinating those staff who would have continuous and direct contact with plaintiff. The recommendation was the same for the day program at the Occupational Resource Center, i.e. to inoculate those staff with continuous, frequent, and extensive contact with plaintiff.

54. In addition to immunizing the staff with frequent extensive contact with plaintiff, Dr. Donnell also recommended vaccinating those supervisors or other staff who would normally be used a backup in emergency situations. Furthermore, Dr. Donnell recommended post-inoculation screening to confirm the development of immunity in those staff involved with plaintiff's routine care.

55. In the medical opinion of Dr. Perrillo, the fact that plaintiff would be the only carrier at Woodhaven Learning Center and one of only two carriers at Woodhaven School, Inc., and that the physical layout of both programs would obviate the need for most staff to have physical contact with plaintiff means that immunization would be required only for those staff having routine hands-on contact with plaintiff.

56. The deaf/blind program in which plaintiff would have been placed at Woodhaven Learning Center is located in the Parmly Building. The Parmly Building is a separate and distinct one-story building located on the Woodhaven Learning Center campus. It has its own dining room and kitchen, and only its residents eat there. The dining room, kitchen, and small television room occupy the center of the Parmly Building and on either end are two living areas or wings. In the basement, there are two recreation rooms. Each of the two wings has its own central day-room or common area with double-occupancy bedrooms opening into the day-room. Every two bedrooms share a bath. There is also a laundry room in each wing.

57. At the Occupational Resource Center, clients are assigned to specific tables on the production floor which serve as the client's work place. The Occupational Resource Center is partitioned into 5 areas — an office area, work activities center, a break or lunch area, a workbench area, and an area where clients work on word-processing equipment.

58. In Dr. Perrillo's opinion, Woodhaven Learning Center could have eliminated any significant risk that plaintiff would

transmit hepatitis B to unimmunized staff by vaccinating the life skills instructors who would have routine physical contact with plaintiff, the supervisory staff in his building, the LPN assigned to his wing of the building, and the nurse and doctor providing patient care at the Learning Center.

59. In Dr. Perrillo's opinion, the Occupational Resource Center of Woodhaven School, Inc. could have eliminated any significant risk that plaintiff would transmit hepatitis B to unimmunized staff by vaccinating the vocational instructor and aides who would implement plaintiff's program, a staff person for replacement during absences and vacation, and the monitors on the bus he would ride from the Learning Center to the day program.

60. Like Dr. Donnell, Dr. Perrillo recommended post-inoculation screening for those staff having routine hands-on contact with plaintiff and encouraging anyone who did not develop sufficient levels of protective antibody to work in areas away from plaintiff.

61. Dr. Perrillo also recommended that other non-direct contact staff, like janitorial and housekeeping staff, would not need to be immunized since their risk of exposure could be minimized by wearing gloves when handling plaintiff's belongings, and by properly marking and labeling these items.

62. According to a one-week staffing pattern for the west wing of the Parmly Building (the building in which plaintiff would have been assigned) at Woodhaven Learning Center, 19 people are required to provide direct care in a 1:3 staff-to-client ratio. That ratio necessitates more staff than the 1:4 staff-to-client ratio required by state licensing rules.

63. At the present time, there are 5 supervisory staff in the Parmly Building. In the past, there were 6 supervisory staff. Approximately 16 to 20 residents live in each wing of the Parmly Building.

64. In 1985, it would have cost Woodhaven Learning Center $4,600 to inoculate and screen the routine hands-on staff designated to work directly with plaintiff and to screen for immunity.

65. It would cost Woodhaven Learning Center $6,500 at the present time to inoculate and screen the routine hands-on staff designated to work directly with plaintiff and to screen for immunity the clients who live in a wing of the Parmly Building with plaintiff.

66. According to the Assistant Executive Director of Woodhaven Learning Center, it had a turnover rate of 75% of its employees in 1986. It would cost Woodhaven Learning Center $4,400 per year to inoculate and screen 75% of the newly employed, routine hands-on staff designated to work directly with plaintiff.

67. The base budget of Woodhaven Learning Center is $4 million per year.

68. In a September 25, 1985, meeting with DMH officials and others, Mark Hassemer of Woodhaven School, Inc. admitted that 1 vocational instructor, 1 aide and 1 person to fill in for absences and vacations would have been designated to work directly with plaintiff.

69. In a telephone conversation with plaintiff's mother, Hassemer admitted that 3 or 4 Woodhaven School, Inc. employees would need to be inoculated to work directly with plaintiff.

70. In 1985, it would have cost Woodhaven School, Inc. $500 to inoculate and screen the staff designated to work directly with plaintiff.

71. Currently, it would cost Woodhaven School, Inc. $1600 to inoculate and screen the staff designated to work directly with plaintiff and to inoculate and screen the 3 unimmunized clients at the Occupational Resource Center.

72. Woodhaven Learning Center receives federal financial assistance through Social Security or Supplemental Security Income benefits paid on behalf of residents at the center. It received $431,538.61 in such benefits in 1984, $474,398.06 in 1985, $452,719.49 in 1986 and, through February of 1987, $57,614.49 in such benefits.

73. Woodhaven Learning Center retains an operational checking account in Boone County National Bank, Columbia, Missouri. Woodhaven Learning Center deposits revenues and receipts for services provided to residents into said operational fund account. Woodhaven Learning Center uses money from said account to pay for salaries of Woodhaven Learning Center employees, residents' food, material for residents' programs, repairs for buildings and all other kinds of operational activities at Woodhaven Learning Center.

74. Woodhaven School, Inc. receives federal financial assistance through the Missouri Department of Mental Health from Title XX Social Services block grant program. For the 1987 fiscal year, Woodhaven School, Inc. received $247,204.46 in Title XX funds as of May 19, 1987. In fiscal year 1986, it received $72,710.91 in such funds, $22,716.62 in 1985, and $46,256.51 in 1984.

75. Woodhaven School, Inc. has also received federal financial assistance in the following amounts:

TITLE VI-C FUNDS FROM THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION:

10/1/83 to 9/30/84	$ 51,000
10/2/84 to 9/30/85	55,277
10/1/85 to 9/30/86	38,583
10/1/86 to 9/30/87	37,642
Total VI-C	$182,502

HELEN KELLER NATIONAL CENTER:

10/1/83 to 9/30/84	$ 17,960
10/1/84 to 9/30/85	13,769
10/1/85 to 9/30/86	7,917
10/1/86 to 9/30/87	None
Total Helen Keller National Center	$ 39,646

HELEN KELLER NATIONAL CENTER TAC:

10/1/86 to 3/31/87	$ 20,767
	$ 60,413

BUREAU FOR THE BLIND:

January, 1983 through June 30, 1986	$ 73,714

76. Woodhaven School, Inc. maintains a checking account in Boone County Bank, Columbia, Missouri, for all its operational expenses. Woodhaven School, Inc. deposits all money received for provision of educational, vocational, therapeutic, and other services provided into this operational checking account.

77. The operational expenses paid for out of said checking account include payment for rent, school supplies and all other day-to-day expenses of Woodhaven School, as well as payment to the electronic data processing firm that pays Woodhaven School employees.

II. Conclusions of Law

In 1973, Congress enacted the Rehabilitation Act to "develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent

living." 29 U.S.C. § 701. The guarantee of equal opportunity for handicapped individuals is contained in Section 504 of the Act which provides that:

> "No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . ." 29 U.S.C. § 794 (Supp. 1987).

A. **Dennis Kohl is a Handicapped Individual Within the Meaning of the Rehabilitation Act and its Implementing Regulations**

In 1974, Congress expanded the definition of "handicapped individual" protected from discrimination by Section 504. That definition includes:

> "Any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B).

The federal regulations implementing Section 504 define "physical or mental impairment" as:

> "(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(j)(2)(i).

In addition, the regulations define "major life activities" to include "functions such as caring for one's self, performing

manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. § 84.3(j)(2)(ii).

In denying defendants' motions for summary judgment and for judgment on the pleadings, this Court concluded that "plaintiff, by reason of being diagnosed as an active carrier of . . . Hepatitis B, is a 'handicapped individual' as that term is used in 29 U.S.C. § 706(7)(B), since plaintiff is regarded as having such an impairment. . ." Order, May 18, 1987 at p. 8-9 ("Order"). The Court's conclusion is consistent with the recent Supreme Court decision in *School Board of Nassau County, Florida v. Arline,* ___ U.S. ____, 107 S.Ct. 1123 (1987). In *Arline,* the Supreme Court held that an individual suffering from the contagious disease of tuberculosis was a "handicapped individual" within the meaning of Section 504. *Id.* at ____, 107 S.Ct. at 1130. The Supreme Court found that plaintiff had a physical impairment since tuberculosis affected her respiratory system, and that her hospitalization for tuberculosis was sufficient to establish a record of an impairment within the meaning of § 504.

This Court found that *Arline's* analysis of the legislative history behind § 504 lends support to the conclusion that a person with a contagious disease like hepatitis B, while not physically impaired by it, is a "handicapped individual" within the meaning of the Act. When Congress in 1978 amended the definition of "handicapped individual," it meant "to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Arline,* ___ U.S. at ____, 107 S.Ct. at 1126-27, *quoting Southeastern Community College v. Davis,* 442 U.S. 397, 405-406 n. 6, 99 S.Ct. 2361, 2366-2367 n.6. By including those regarded as being impaired in its definition of "handicapped individual," it is clear that

> "Congress acknowledged that society's accumulated myths and fears about disability and disease are as han-

> dicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments. . . " *Arline*, ____ U.S. ____, 107 S.Ct. at 1129.

Construing § 504 to include those with contagious diseases is consistent with the basic purpose of the Act "which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.*

The regulations promulgated by the Department of Health and Human Services similarly indicate that a person suffering from a contagious disease without any physical impairment is a "handicapped individual" under § 504. Section 84.3(j)(2)(iv) defines the statutory phrase "regarded as having an impairment" to mean

> "(A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairments; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by the recipient as having such an impairment." 45 C.F.R. § 84.3(j)(2)(iv).

As a carrier of hepatitis B, Dennis Kohl is a "handicapped individual" within the meaning of § 504. Hepatitis B is a physiological disorder or condition which affects his hemic,

digestive, and endocrine systems. His carrier status means that the hepatitis B virus is in his liver and produces viral particles found in his blood and other body fluids.

Like the plaintiff in *Arline,* Dennis Kohl also has a "record" of a physical impairment which substantially limits his major life activities. Since the summer of 1983, he has repeatedly been tested and diagnosed as a hepatitis B carrier. He has had hepatitis B because one cannot become a hepatitis B carrier without having had the hepatitis B viral infection. Furthermore, plaintiff was previously denied admission to a training program because of his hepatitis B carrier status. In 1983, the St. Louis Association for Retarded Citizens refused to accept plaintiff for its adult developmental day program, thereby substantially impairing his ability to learn and work.

More importantly, plaintiff "is regarded as" having a physical impairment which substantially impairs his ability to learn and work. Defendants Woodhaven Learning Center and Woodhaven School, Inc. provide daily living skills and vocational training. Defendants denied him access to that training "primarily as a result of the belief by those at the facilities that . . . [his] condition poses a threat to third parties within the facility." Order, p. 8. Thus, defendants have treated plaintiff as having an impairment and have substantially limited his ability to learn and work as a result of their attitudes toward his carrier status. Therefore, the Court concludes that plaintiff is a "handicapped individual" within the meaning of Section 504.

B. **Defendants Discriminated Against Dennis Kohl Solely on the Basis of his Hepatitis B Carrier Status**

As previously noted, Section 504 prohibits discrimination against an otherwise qualified handicapped individual solely on the basis of his handicap. In this case, the Court concludes that defendants have excluded plaintiff from their programs "solely by reason of" his status as a hepatitis B carrier.

In several key documents, Woodhaven Learning Center admitted that plaintiff was appropriate for their programs and that they excluded him solely because of his carrier status. On September 10, 1984, the Assistant Executive Director of Woodhaven Learning Center, James Michael, wrote plaintiff's case manager and stated that "[b]oth the residential and day program evaluations were completed and he was determined to be appropriate for the residential as well as vocational programs offered by Woodhaven Learning Center and the Occupational Resource Center." Plaintiff's Exhibit 16. Michael made no indication that plaintiff's behavior problems rendered plaintiff ineligible or inappropriate for Woodhaven Learning Center's programs. Michael stated that the reason for dismissal at that time was that Woodhaven School, Inc. refused to provide a day program for him "without a screening and inoculation program for its staff."

However, subsequent statements by Woodhaven Learning Center employees indicated that it was plaintiff's carrier status and not Woodhaven School's refusal to provide a day program which led to his dismissal and would determine his readmission. In May and again in July, 1985, Woodhaven Learning Center staff informed the Kohls that hepatitis B immunization was underway for Learning Center residents and that plaintiff could return there after completion of the immunization process. Plaintiff's Exhibits 4 and 5. In other words, once the risk of infectivity from plaintiff's hepatitis B was addressed by the residents' immunization, Woodhaven Learning Center was prepared to readmit him regardless of his behavior problems or the availability of a day program. Woodhaven Learning Center, however, did not readmit plaintiff after its residents' immunization; rather, the basis for exluding him then became the need to inoculate contact staff against hepatitis B. As Charles Brewer admitted to the Kohls, "[i]t will be our policy not to accept hepatitis carriers to our residential population until a time when funds are made available to innoculate [sic] contact staff." Plaintiff's Exhibit 6. Again, Brewer did not men-

tion the lack of a day program or plaintiff's behavior problems. Even though Brewer testified at trial that Woodhaven Learning Center was beginning to exclude some clients with serious behavior problems at that time, he did not mention those changes as a basis for their decision to exclude plaintiff. The only stated reason for refusing to allow plaintiff to return to Woodhaven Learning Center was his hepatitis B and the costs involved in inoculating contact staff.

The basis for discrimination is equally clear on the part of Woodhaven School, Inc. Like Woodhaven Learning Center, Woodhaven School, Inc. also found that plaintiff was a good candidate for its vocational intervention program. Plaintiff's Exhibit 17. Woodhaven School, Inc. attached an addendum to its vocational evaluation which was later mailed separately to plaintiff's case manager. The addendum focused on plaintiff's status as an active carrier of hepatitis B and information described in a Department of Mental Health information packet on hepatitis B. Plaintiff's Exhibit 33. The addendum stated that "because of the precautions required in handling a hepatitis B carrier, Dennis' aggressive behaviors, the behaviors of the individuals in ORC's programs and the current status of DMH's screening and inoculation program, the Occupational Resources Center presently cannot accept Dennis as an active client." Plaintiff's Exhibit 33. While the report certainly mentions plaintiff's behavior problems, it is clear that Woodhaven School, Inc. was concerned with his maladaptive behaviors only because they increased the risk of him transmitting hepatitis B. Furthermore, the addendum reveals that behavior problems *per se* did not disqualify clients for the ORC programs; on the contrary, the addendum indicates that other clients at Woodhaven School had behavior problems which might also have heightened the risk of transmission.

The most succinct statement of the basis for Woodhaven School, Inc.'s denial of plaintiff into its program is contained in its policy on hepatitis B and the Executive Director's report for

November 21, 1985. In his report, Hassemer wrote: "[a]s reported earlier, we have requested funding to screen and inoculate [sic] staff expected to work with the active carrier of Hepatitis B. The referral (or funding) agency has balked at this request, and as a result, we have not admitted an infectious carrier into our program." Plaintiff's Exhibit 32. In other words, Woodhaven School, Inc. refused to admit plaintiff because it would not pay and could not find another source to pay for inoculating the staff designated to work with plaintiff. No other reasons for the decision were mentioned. In its official policy, Woodhaven School, Inc. stated that it was requiring the agency referring a hepatitis B carrier with maladaptive behaviors to pay Woodhaven School, Inc. for the cost of protecting the staff designated to work with the carrier. By predicating admission on reimbursement for inoculating the direct contact staff, Woodhaven School, Inc. made clear that is concern was with plaintiff's status as a hepatitis B carrier and the cost of inoculation.

Thus, the Court concludes that plaintiff was denied admission to both Woodhaven Learning Center and Woodhaven School, Inc. solely on the basis of his status as a carrier of hepatitis B.

C. **Defendants are Recipients of Federal Financial Assistance within the Meaning of Section 504.**

Section 504 of the Rehabilitation Act prohibits discrimination by recipients of Federal financial assistance. 29 U.S.C. § 794. The regulations define "recipient" to include "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization or other entity, or any person to which federal financial assistance is extended directly or through another recipient." 45 C.F.R. § 84.3(f). Both Woodhaven Learning Center and Woodhaven School, Inc. are private entities which receive substantial amounts of federal funding directly or through another recipient.

Defendant Woodhaven Learning Center has stipulated that it receives federal financial assistance. *See* Plaintiff's Exhibit 1, Part I, ¶ 6. Specifically, it receives Social Security or Supplemental Security Income (SSI) benefits for residents at the Center. For the 1987 fiscal year, Woodhaven Learning Center had received $57,614.49 (through February, 1987) in Social Security or SSI benefits. It received $457,719.49 in such benefits in 1986, $474,398.06 in 1985, and $431,538.61 in 1984. *Id.* Woodhaven Learning Center deposits its revenues and receipts for services to its residents in an operational checking account, and funds from that account are used to pay for the Center's services and programs. See *Id.*, ¶ 9.

Defendant Woodhaven School, Inc. also receives federal financial assistance. Through the Missouri Department of Mental Health, it receives Title XX Social Security block grant funds. For the 1987 fiscal year, Woodhaven School, Inc. received $247,204.467 in Title XX funds as of May 19, 1987. It received $72,710.91 in such funds in fiscal year 1986, $22,716.62 in 1985, and $46,256.47 in 1984. In addition to Title XX federal funds, Woodhaven School, Inc. stipulated that it has received other federal financial assistance from 1984 through 1987, including Title VI-C funds from the Missouri Department of Elementary and Secondary Education, federal funds from the Helen Keller National Center, and federal funds from the Bureau for the Blind. Plaintiff's Exhibit 1, Part II, ¶ 5. Woodhaven School, Inc. deposits the funds it receives in an operational checking account, and funds from that account are used to pay for the day-to-day expenses of the School. *Id.* ¶ 11.

Thus, the Court finds that both defendants are recipients of federal financial assistance as defined in § 504.

D. **Dennis Kohl is Otherwise Qualified for the Residential and Training Programs of Woodhaven Learning Center and Woodhaven School, Inc.**

Section 504 prohibits discrimination against handicapped individuals who are otherwise qualified for the program or

benefits at issue. In *Southeastern Community College v. Davis*, 442 U.S. at 406, the Supreme Court defined an otherwise qualified person as "one who is able to meet all of a program's requirements in spite of his handicap." In the employment context, an otherwise qualified person is one who can perform the "essential functions" of the job in question. 45 C.F.R. § 84.3(k)(1) (1985). With regard to health, welfare and other social services, an otherwise qualified handicapped person is one who "meets the essential eligibility requirements for the receipt of such services." 45 C.F.R. § 84.3(k)(4). For the following reasons, the Court concludes that plaintiff has met and continues to meet the essential eligibility requirements for defendants' programs.

1. **Past Eligibility**

In 1983, the Missouri Department of Mental Health found Woodhaven Learning Center, together with the day program at Woodhaven School, Inc., to be the most appropriate placement for plaintiff. DMH is obligated by state law to place its clients in the least restrictive environment. *See* Mo. Rev. Stat. § 633.115. At the time of this recommendation, plaintiff was residing in a community placement at Colonial Town. The department's community placement committee recommended referring plaintiff to Woodhaven Learning Center and Woodhaven School, Inc. because they had a deaf/blind program, and plaintiff, as a blind, mentally retarded individual, had particular needs which the Department's private vendors in the St. Louis area could not meet.

Woodhaven Learning Center itself also found that plaintiff met its essential eligibility requirements. The admissions materials which Woodhaven Learning Center received on plaintiff documented both his hepatitis B and his behavior problems. With that information before it, the Admission and Discharge Committee nevertheless concluded that plaintiff was appropriate for evaluation in the deaf/blind program in the Parmly Building.

After plaintiff had resided at Woodhaven Learning Center, the center continued to consider him appropriate for the deaf/blind program. At this 30-day evaluation, the Learning Center staff noted the progress he had already made in their program. Plaintiff was "well on his way to independent dressing" and had developed "the orientation and mobility skill of wall trailing. . . more than current date indicates." The staff was also "confident that he has the capability to gain total independence in bathing with training." Plaintiff's Exhibit 17. The staff had observed some behavior problems, but had designed a behavior management program which they thought would reduce his maladaptive behavior by August of 1985. From the 30-day evaluation meeting, Nancy Shrewsbury, plaintiff's case manager, understood that the Woodhaven Learning Center staff felt that plaintiff was appropriate for their program.

That conclusion was borne out in the September 10, 1984 letter which James Michael, the Assistant Executive Director of Woodhaven Learning Center, sent to Shrewsbury. In that letter, Michael informed her that the residential evaluation had been completed and plaintiff was found appropriate for the center's services. In fact, Michael stated that plaintiff "was determined to be appropriate for the residential as well as the vocational programs offered by Woodhaven Learning Center and the Occupational Resource Center." Plaintiff's Exhibit 18.

As Michael's letter indicates, Woodhaven School, Inc. also found plaintiff appropriate for their vocational program. Although "Dennis' lack of a formal educational or vocational program has resulted in a very severe deficit in the knowledge of, or skills required for a work setting," the School's certified vocational evaluator concluded that plaintiff's "willingness to all physical manipulation and his cooperation with the instructor . . . makes him a good candidate for vocational intervention." Plaintiff's Exhibit 17. The evaluator also recommended a vocational training plan for plaintiff. That

plan called for a "preshelter workshop/vocational skills development" program to equip him with the skills necessary to move on to "full-time employment in a sheltered workshop." Plaintiff's Exhibit 17. To implement the vocational program for plaintiff, the evaluator suggested a tutor/companion to speed up plaintiff's skill acquisition and a behavior intervention program to reduce his maladaptive behaviors. *Id.* The Executive Director of Woodhaven School concurred with this conclusion that plaintiff was a good candidate for vocational intervention, and he also believed that plaintiff would have benefitted from the vocational services offered at Woodhaven School, Inc.

Thus, at the time defendants refused to accept plaintiff for their programs, defendants admitted that he was appropriate for and could benefit from these same programs. They recognized that his hepatitis B was not the kind of handicap which would preclude him from reaping the benefits of the training that they could provide. Plaintiff's behavior problems *per se* did not render him inappropriate for their programs. On the contrary, defendants made him more appropriate for the behavior management training which both defendants provided and which they included in their habilitation and vocational plans for plaintiff.

2. **Present Eligibility**

Plaintiff still meets defendants' essential eligibility requirements. Despite defendants' contention that plaintiff no longer fits within the scope of their services and that the Court should not order prospective injunctive relief directing them to accept plaintiff, the evidence shows that their programs remain appropriate for his needs.

The Department of Mental Health continues to consider Woodhaven Learning Center and Woodhaven School, Inc. the appropriate placement for plaintiff. Plaintiff is on the Department's referral list for community placement, which means that he does not require the most restrictive environment of a state

institution and his needs can be met by services in the community. However, plaintiff is not simply on the DMH community placement referral list; he is on the Department's specific referral list for Woodhaven Learning Center because of his blindness.

The fact that DMH still has plaintiff on its Woodhaven Learning Center referral list belies the center's contention that he no longer meets its eligibility requirements. While DMH and Woodhaven Learning Center agreed to some changes in the client population at the center, those changes have not affected plaintiff's eligibility.

Dr. Green also concluded that Woodhaven Learning Center could serve plaintiff appropriately within the scope of the staffing ratio required by state licensure. Specifically, Dr. Green testified that "the deaf-blind program at Woodhaven Learning Center would provide Dennis Kohl with residential services including daily living skill training and manage his behaviors within the limits of its one to four staff to client ratio." Transcript, Vol. 3, p. 55-56. Thus, this evidence shows that plaintiff meets the present eligibility requirements of Woodhaven Learning Center.

Plaintiff also continues to meet the essential eligibility requirements of Woodhaven School, Inc. The vocational training plan developed for plaintiff during his evaluation at the school called for "presheltered workshop/vocational skills development" with a behavior management program and a tutor/companion. Plaintiff's Exhibit 17. The school now provides developmental training, but it simply moved the clients from pre-sheltered workshop into developmental training because of the long waiting list for clients to progress from presheltered training into the sheltered workshop. Thus, plaintiff, like the other clients formerly in the presheltered workshop, would be appropriate for the school's developmental training. Indeed, the school's Executive Director admitted that the school "could

provide services that are recommended" in plaintiff's vocational evaluation. Transcript, Vol 2, p. 250. The school's description of services specifically provides that clients in developmental training "may display intermittent behavior problems." Plaintiff's Exhibit 31. Furthermore, the school's contract with DMH still includes behavior management as a service which the Department could purchase for its clients. Plaintiff's Exhibit 31. Although tutor/companion services are not in its present contract, Hassemer testified that an extension of that service might be possible. Dr. Green, however, saw "no real reason to have someone always one on one with Dennis Kohl." Transcript, Vol 3, p. 92. In fact, Dr. Green testified that the Occupational Resource Center could "provide Dennis Kohl with the developmental or prevocational training and manage any behavior problems within the limits of its one-to-six staff-to-client ratio." Transcript, Vol. 3, p. 62. Thus, plaintiff still meets the eligibility requirements of Woodhaven School, Inc.

3. **Under the Analysis set forth by the Supreme Court in *Arline*, Plaintiff is Otherwise Qualified**

Although plaintiff meets the essential eligibility requirements of defendants' programs, the Court must determine whether plaintiff is "otherwise qualified" under the standards pronounced by the United States Supreme Court in *School Board of Nassau County, Florida v. Arline*, ___ U.S. ___, 107 S.Ct. 1123 (1987). As the *Arline* court explained, the question of whether a handicapped person is "otherwise qualified" involves a two-step inquiry. In a case where the individual is handicapped by having a contagious disease, the first step is an individualized inquiry which should include:

> "[findings of] facts, based on reasonable medical judgments, given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to

third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *Id.*, ____ U.S. ____, 107 S.Ct. at 1131.

Second, the trial court must determine, in light of these medical findings, if the accommodation necessary to eliminate any significant risk of communicating the disease is reasonable. In this case, the Court finds that the inoculation of "direct-contact staff" — those having direct, routine physical contact with plaintiff — would substantially reduce the risk of transmission, and that such accommodations would not require fundamental alteration of defendants' programs or impose any undue burden on them.

a. **The nature of the risk (how the disease is transmitted)**

(1) **What is hepatitis B?**

Hepatitis B is an inflammation of the liver due to infection with the hepatitis B virus. In most cases, the inflammation results in a flu-like illness so mild that it will not be brought to the attention of a physician. In acute, self-limiting hepatitis B, the symptoms may last days or weeks, but typically, the symptoms last for a few weeks. Some individuals develop more florid signs of the inflammation, experiencing jaundice of the skin, darkening of the urine, and feelings of fatigue.

There are approximately 200,000 reported cases of hepatitis B every year in the United States. The fatality rate for reported cases of the disease is less than 1%. Some 5-10% of the hepatitis B cases develop chronic infection or carrier status instead of having the self-limiting disease. A carrier is an individual who tests positive for surface antigen for longer than three to four months. Individuals who have an active case of hepatitis B infection and carriers who are chronically infected can transmit the disease to susceptible individuals.

There is no dispute here about whether plaintiff was and is a carrier of hepatitis B. From July of 1983 to his most recent test

on May 8, 1987, he has tested positive for the surface antigen showing that he is a carrier.

(2) How is hepatitis B transmitted?

There is a likelihood of exposure to hepatitis B when the body fluids of an infected person contact the body fluids of a susceptible person. In other words, the body fluids of an infected person must cross the intact skin or mucosal barrier of an individual who does not have immunity to hepatitis B before there is a possibility of contracting the hepatitis B virus. Almost all body fluids of an infected person contain infectious viral particles. However, not all body fluids have the same level of infectiousness. Blood is the most infectious body fluid. Saliva, on the other hand, has not been shown to be infectious without a trace contaminant of blood in the saliva. Thus, blood is 100 to 1000 times more infectious than saliva.

Hepatitis B illness or infection does not automatically result from body fluid-to-body fluid contact. A great number of individuals receiving a known exposure of the body fluid of an infected individual will not come down with the illness or infection. In fact, even where there is exposure to blood known to be surface antigen positive, there is only a 1-in-20 chance of getting the infection.

Hepatitis B is not transmitted by casual association or contact with a carrier. It is not transmitted through the air by a cough or sneeze. Infected blood or saliva on a physical surface could present a likelihood of exposure to a susceptible individual whose broken skin came into contact with the surface. However, the mechanical action of rubbing and cleaning the surface with a solution of dilute clorox or household bleach will disinfect it and will take care of any residual virus.

The risk of plaintiff spreading the disease is heightened a great deal by plaintiff's maladaptive behavior, which includes biting, scratching and open masturbation. However, the Court

finds, based on the testimony of Dr. Green and Madge Alter, a DMH psychologist, that most of plaintiff's behavioral problems have significantly diminished. When he observed plaintiff in May of 1987, Dr. Green stated that he saw no aggressive, self-abusive, or inappropriate sexual behaviors. The DMH staff with whom Dr. Green conferred indicated that they were having no problems with aggressive behavior from plaintiff. In Dr. Green's opinion, plaintiff's behavioral problems, particularly his self-injurious behaviors, have occurred when he was unoccupied and not involved in consistent, daily training on mobility, communication, bathing and other basic skills. According to Dr. Green, the best and most fundamental way to diminish plaintiff's maladaptive behaviors is to fill his hands and his time working on his favorable behaviors and to engage him in effective adaptive behavior programming. Indeed, the vocational and daily living skills training at the school and the center are precisely the kind of adaptive behavior programming which can substantially diminish or eliminate plaintiff's behavior problems.

b. **The duration of the risk (how long is the individual infectious)**

Carriers of hepatitis B may, but do not necessarily, remain carriers all of their lives. While many carriers may retain their infectiousness lifelong, about 1% of carriers spontaneously lose their carrier status each year, in which case all evidence of infection disappears and the infection is in permanent remission.

Furthermore, carriers of hepatitis B do not have the same level of infectivity. The difference in infectivity is shown by a blood test known as the e antigen test. The test measures the amount of complete viral particles produced by the carrier. Carriers produce both complete and incomplete viral particles, and it is the complete viral particles which transmit the infection. A carrier, then, who tests e antigen positive is producing large amounts of the infectious complete viral particle, while a carrier

who is negative for the e antigen is making many more incomplete viral particles and small amounts of the complete particle. Thus, carriers who are e antigen negative are at a significantly lower level of infectivity and contagiousness than e positive carriers. In fact, given the same source and type of exposure, the e antigen negative carrier is 3 to 4 times less likely to infect a susceptible individual than the e positive carrier.

It is not unusual for a carrier to move from e antigen positive to e antigen negative since between 5 to 10% of all carriers per year will go from this higher level of infectivity to the lower e antigen negative level. In this case, plaintiff has gone from e antigen positive to e antigen negative. In tests administered between July, 1983 and November, 1985, plaintiff was e antigen positive. However, in September of 1986, plaintiff tested e antigen negative, and, again, in May of 1987, he was negative, showing that he is still at the lower level of infectivity.

c. **The severity of the risk (what is the potential harm to third parties)**

There is a highly effective, pre-exposure vaccine for hepatitis B. This pre-exposure vaccination provides active long-term immunity to hepatitis B. Inoculation with the vaccine, particularly when followed by a blood test to confirm the development of immunity, can eliminate virtually any potential harm to third parties resulting from the bite or scratch of a hepatitis B carrier.

Immunization with the vaccine is conferred in three doses. Three shots are given — one initially, another one month later, and a final shot six months later. The side effects or risks associated with the vaccine are minimal. Less than 5% of those vaccinated will develop a low-grade fever or some irritation at the point of injection. There is no risk of picking up any other infectious agent, such as AIDS, from the vaccine.

Available commercially since the end of 1982, the vaccine is highly effective. In a general range of the population, it confers

immunity at an 85-95% rate. Among young and middle-aged individuals, the vaccine is 95-98% effective. Very obese individuals, those who are immuno-compromised or have Down's Syndrome, and those over 50 develop immunity from the vaccine at a lower rate. The vaccine is so highly effective that post-inoculation testing to confirm the development of immunity from the vaccine is not generally recommended. However, where individuals have a greater risk of exposure to the virus, post-inoculation testing can be done to assure that the vaccine has provided them with a high level of protective antibody. Although it is not clear for how long the vaccination confers immunity, the Communicable Disease Center is expected to recommend a booster shot five years after the initial inoculation.

There is also a product available to protect an unimmunized individual who experiences a significant exposure to the hepatitis B virus. This product is known as hepatitis B immune globulin. Given within 48 hours after the exposure, hepatitis B immune globulin gives the unimmunized person a large amount of antibody to help his or her system fight the virus and develop short-term immunity to the disease. At the same time, the regular immunization process is also begun. While not as effective as the vaccine, hepatitis B immune globulin is a good and generally effective post-exposure prophylaxis.

These two products, the pre-exposure vaccine which is 85-95% effective and the post-exposure prophylactic which can be used in an emergency situation if an unimmunized person is exposed to the virus, provide a means for eliminating virtually any potential harm to third parties posed by plaintiff.

d. **The probability the disease will be transmitted and will cause varying degrees of harm**

The *Arline* decision requires an individualized inquiry into the risks presented by the particular handicapped individual with a contagious disease. In this analysis, the Court must differentiate between the risk plaintiff could potentially pose to other

clients at the two facilities and the risk plaintiff poses to the staff in the two facilities.

(1) **Clients**

The evidence introduced at trial focused primarily on the probabilities of harm for unimmunized staff at Woodhaven School, Inc. and Woodhaven Learning Center. The focus on the staff was based primarily on the fact that nearly all of the clients in defendants' programs were or will be inoculated against hepatitis B.

At Woodhaven Learning Center, all of the clients have been or will be vaccinated against hepatitis B. The center participated in the screening and inoculation program that DMH implemented for its clients in private placements in 1985. The screening was done in February of 1985; at that time, 162 DMH clients and 43 private/other state residents were screened, and only 1 other carrier was identified. Presently, there is no identified carrier of hepatitis B among the residents of Woodhaven Learning Center.

The immunizations at Woodhaven Learning Center were begun in July, 1985, and completed in January, 1986. Since that immunization, Woodhaven Learning Center has admitted some new residents who were screened but not inocualated. As of April 10, 1987, 168 residents at the center had been inoculated and 16 had not. By the time of trial, however, the center had begun inoculation of the remaining 16 residents.

As of the same date, April 10, 1987, there were 61 clients who receive day programming at the Occupational Resource Center at Woodhaven School. Only three of those clients do not have immunity to hepatitis B either by inoculation or by having had the infection. The school has one client who is an identified carrier of hepatitis B. According to Dr. Perrillo, the three unimmunized clients at the Occupational Resource Center should be immunized to protect them from contracting hepatitis B from

plaintiff. Prior to the time that they have been inoculated, these unimmunized clients could work at a different table or in a different area of the ORC. That separation from plaintiff would minimize the possibility of him exposing them to the virus.

Both Dr. Donnell and Dr. Perrillo testified as to the availability and advisability of post-inoculation screening to confirm the development of immunity in those working directly with plaintiff. The same recommendations would seem appropriate for those clients living with or sharing a work-table with plaintiff.

Thus, it clearly appears that by inoculating the remaining unimmunized clients at Woodhaven School, Inc., any significant risk that plaintiff would pose to the clients in defendants' programs could be eliminated.

(2) Staff

The *Arline* court instructed that, in making its individualized findings of fact, "courts normally should defer to the reasonable medical judgments of public health officials." *Arline,* ____ U.S. ____, 107 S.Ct. at 1131. The public health official who testified in this case was Dr. Donnell, Manager of the Section of Epidemiology Services, Missouri Department of Health. Dr. Donnell's section is responsible for communicable disease control, including the control of hepatitis B.

According to Dr. Donnell, the Missouri Department of Health generally recommends vaccination of staff in the programs and facilities for the mentally retarded; but how many staff should be vaccinated depends on such factors as whether there are carriers in the population, the number of carriers, and the likelihood of transmission. The Department of Health's recommendation is conditionally stated so that no institution would expect that their entire staff be immunized.

Dr. Donnell further testifed that, in the individual circumstances presented by this case, "a barrier of protection"

could be built around plaintiff. Since plaintiff would be the only identified carrier at Woodhaven Learning Center, and since the other residents have been or will be inoculated, the "barrier of protection" could be erected, in lieu of a complete inoculation of the entire staff, by immunizing the "direct contact staff" — those staff who would have continuous and direct contact with plaintiff — and by testing those staff after the vaccination to assure the vaccine has provided them with antibodies. The same recommendation would apply to the day training program at the Occupational Resource Center, i.e., to immunize the "direct contact" staff.

In Dr. Donnell's opinion, the barrier of protection around plaintiff could be preserved even in unforeseen emergency situations requiring staff intervention. He recommended that, in addition to immunizing the staff involved with plaintiff's routine care, the vaccine should be provided to those supervisors or other staff who would normally be used as backup in an emergency situation. Beyond having immunized "direct contact" staff and immunized backup staff, management at the facilities could plan plaintiff's care so as to minimize the possibility of an emergency requiring the intervention of unimmunized staff. Such an emergency would, in Dr. Donnell's opinion, present such a brief kind of exposure that other staff would not need to be vaccinated. Post-exposure prophylaxis with hepatitis B immune globulin could be used to provide protection in an emergency of that nature.

Dr. Robert Perrillo stated that there are two main reasons that Woodhaven Learning Center and Woodhaven School, Inc. would not need to inoculate all of their staff in order to provide plaintiff with services in a safe manner.

First, as demonstrated by recent screenings, defendants have an exceptionally low prevalence of carriers among their client population. In fact, plaintiff would be the only carrier at Woodhaven Learning Center and one of two carriers at the Oc-

cupational Resource Center. Second, the physical layout of defendants' programs are such that most unimmunized staff would not need to have direct physical contact with plaintiff.

According to Dr. Perrillo, Woodhaven Learning Center could have eliminated any significant risk that plaintiff would transmit hepatitis B to its unimmunized staff by inoculating and screening those staff who would have routine hands-on contact with plaintiff. According to Dr. Perrillo, the Center should have taken a "head count" of the staff who would have "actual physical direct contact with Dennis" including "not only individuals involved with his daily care" but also those who "might substitute . . . during periods of vacation." Transcript, Vol. 1, p. 149. Specifically, Dr. Perrillo recommended that the Center should have inoculated the life skills instructors who would provide plaintiff with care and training, the supervisory staff in his building whose jobs would involve hands-on care or training for plaintiff, the LPN assigned to his wing of the building, and the doctor and nurse providing patient care at the center.

By immunizing staff having physical contact with plaintiff, the risk he would present to the other staff would be so remote that they would not require inoculation. The janitorial and housekeeping staff assigned to his building could greatly minimize their risk by wearing gloves when handling his sheets, waste materials, and appliances. Plaintiff's laundry could be bagged and marked, so that laundry workers would know to wear gloves when handling his linens and clothes. His laundry would not require separate cleaning since hot water and detergent kill the virus. Plaintiff's toilet articles could be marked and placed in a safe receptacle. In Dr. Perrillo's medical opinion, other staff such as groundskeepers, LPNs assigned to other buildings, direct care staff working with clients in other buildings, would not need to be immunized. However, those staff should receive in-house training about the presence of a carrier, the means of transmission, and the need to use inoculated staff to handle emergencies.

According to Dr. Perrillo, the Occupational Resource Center of Woodhaven School could also have eliminated any significant risk that plaintiff would transmit hepatitis B to its unimmunized staff. The safety of unimmunized staff could have been insured by inoculating those staff who would have direct physical contact with plaintiff.

Specifically, Dr. Perrillo observed that the vocational instructors and aides who actually worked with plaintiff to implement his program would need to be inoculated. It would also be reasonable to inoculate the monitors on the bus plaintiff would ride from Woodhaven Learning Center to the school. By surrounding plaintiff with these inoculated employees, others, such as administrative staff, instructors and aides working in other parts of the resource center, and therapists who did not provide services to plaintiff, would not need inoculation. Certainly, the staff at the special education program operated by Woodhaven School, Inc. in a different building in a different part of town would not need to be immunized because of the low risk presented by plaintiff's attendance at the Occupational Resource Center.

Like Dr. Donnell, Dr. Perrillo thought that the barrier of protection surrounding plaintiff could be reinforced by post-inoculation screening of those staff providing hands-on care and training for plaintiff. The post-inoculation screening would show any individuals who had not developed immunity and who should, therefore, be encouraged to work in buildings other than the Parmly or other areas of the Parmly Building. Dr. Perrillo testified that if individuals had received the 3-dose inoculation, and screening then confirmed their immunity, then these individuals would not get hepatitis B even if they were scratched or bitten by a carrier. The only qualification to this almost total protection provided by screening-confirmed immunization is if an individual only developed a low level of antibody and then received a large dose of the virus. Since the screening would also reveal those individuals with minimal antibody levels, they too could be encouraged to work in areas away from plaintiff.

By inoculating and confirming immunity in those staff who would need to have routine hands-on contact with plaintiff, defendants could have eliminated and still can eliminate any significant risk of his transmitting hepatitis B to the immunized or unimmunized staff.

Since plaintiff is and would have been the only identified carrier at Woodhaven Learning Center and one of only two carriers at the Occupational Resource Center, the immunized hands-on staff would provide a barrier of protection between plaintiff and the unimmunized staff. The efficacy of that immunity barrier was and is heightened by the physical layout of defendants' programs, meaning that other unimmunized staff have little, if any, physical contact with plaintiff. Additionally, protection can and could have been provided by in-house training and management practices designed to ensure that any exposure-threatening emergency involving plaintiff would be handled by immunized staff. Finally, hepatitis B immune globulin is and has been available to provide effective post-exposure protection in the unlikely event that an unimmunized employee were the only person available to give CPR, first aid, or other assistance to plaintiff.

3. Inoculating and Screening the "Direct Contact" Staff Designed to Work With Plaintiff is a Reasonable Accommodation of His Handicap

The individualized medical findings in this case show that defendants can eliminate any significant risk of plaintiff transmitting hepatitis B by inoculating and screening the staff designed to work directly with him. If that accommodation is a reasonable one under the established standards, then plaintiff is an "otherwise qualified" handicapped individual under Section 504.

In *Arline,* the Supreme Court summarized the standard for reasonable accommodation. "Accommodation is not reasonable if it either imposes 'undue financial and ad-

ministrative burdens on a grantee' . . . or requires 'a fundamental alteration in the nature [the] program.' " *Arline,* ____ U.S. ____, n. 7, 107 S.Ct. at 1131, n. 7, *quoting Southeastern Community College v. Davis,* 442 U.S. at 410, 412.

Accommodating plaintiff clearly would not require a fundamental alteration in the nature of defendants' programs, and, plaintiff can obviously "realize and enjoy" the benefits of defendants' residential and training programs in spite of his handicap. Plaintiff's hepatitis B, in and of itself, does not impair his ability to realize the benefits of training and from acquiring mobile skills, daily living or vocational skills. In fact, defendants themselves found plaintiff to be appropriate for their programs. Plaintiff's status as an active carrier of hepatitis B simply requires accommodation to eliminate any significant risks that he poses to others; this status does not affect ability to benefit from defendants' programs, and thus accommodating him would not involve a fundamental alteration of those programs.

Inoculating and screening the staff designated to work with plaintiff also would not impose any undue financial or administrative burden on defendants. In *Nelson v. Thornburgh,* 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd,* 732 F.2d 146 (3rd Cir. $984), *cert. denied,* 105 S.Ct. 955 (1985), the District Court required the Pennsylvania Department of Public Welfare to hire readers or provide the mechanical equivalents of readers in order to accommodate blind income maintenance workers. *Id.* at 382. In so holding, the court noted that "[c]ases interpreting section 504 have uniformly recognized that preventing discrimination against the handicapped may mean that recipients of federal funds will have to expend funds of their own." *Id* at 381.

In this case, the two costs involved here are inoculation and screening. The evidence on the per person cost of inoculation showed a range from about $100 in 1985 to about $150-175 now. The cost of post-inoculation screening is approximately $20 to $25.

For Woodhaven Learning Center, the cost of accommodating plaintiff is and would have been minimal. According to Dr. Perrillo, the center could have eliminated any significant risk of plaintiff transmitting hepatitis B by inoculating and screening the direct care or life skill instructors working directly with plaintiff, some other instructors to fill in during absences or vacations, the LPN assigned to his wing of the building, the supervisory staff in his building, and the nurse and the doctor on the staff. According to James Michael, the Assistant Executive Director of the Center, there are 5 supervisory staff in the Parmly Building; in the past, there were six.

Mr. Michael also prepared a one-week staffing pattern for the west wing of the Parmly Building. *See* Plaintiff's Exhibit 26. Although that pattern reflects an ideal 1:3 staff-to-client ratio rather than the 1:4 ratio required by state licensing rules, it shows that 19 people would be required to provide direct care to plaintiff on a wing of the building in which plaintiff would be placed. In 1985, it would have cost approximately $2375 to inoculate and screen those 19 direct care staff in the Parmly west wing; it would cost approximately $3800 now. In addition, it would have cost approximately $1125 in 1985 to inoculate the supervisory staff, LPN nurse and doctor; the cost would be $1600 now. Mr. Michael's diagram also notes that hours for vacation and sick leave replacement is calculated by using a factor of .1 or 5.7 hours per week for the Parmly west wing. Plaintiff's Exhibit 26. Although the diagram does not indicate how many staff would be used to provide that additional 5.7 hours of replacement time per week, it does not seem unreasonable that two to three other staff at a cost of $375 to $600 could be inoculated and screened to serve as the designated replacements for any absences or vacations in the Parmly wing where plaintiff would live. Finally, if the 16 to 20 clients living with plaintiff were screened to make sure that they were immune, such screening would cost $400 to $500.

In summary, it would have cost Woodhaven Learning Center approximately $4600 in 1985 to accommodate plaintiff and ap-

proximately $6500 now. Since the Woodhaven Learning Center has its own medical staff, the overhead costs of administering the shots and blood tests would be minimal. Furthermore, costs might even be reduced by purchasing the serum in bulk. The staff turnover experienced by Woodhaven Learning Center would appear to require additional inoculation and screening in the future. In 1986, Michael indicated that the Center had hired 226 new employees out of a total of 300 — a turnover rate of approximately 75%. Assuming that same turnover rate would apply in the future to staff in the Parmly west wing, approximately 22 employees per year would need to be inoculated and screened at a cost of $4400.

These costs to accommodate plaintiff would not have imosed and will not impose an undue financial burden on Woodhaven Learning Center. Expenditures of $4600 in 1985, $6500 now, and perhaps $4400 per year in the future, are a minute fraction of Woodhaven Learning Center's $4 million per year budget.

For Woodhaven School, Inc., the costs for accommodating plaintiff would be equally modest. At the time the School excluded plaintiff from its program, Hassemer had indicated that 3 to 4 people would have been designated to work directly with plaintiff. According to Nancy Shrewsbury, that figure included a person to fill in for absences and vacations. Therefore, it would have cost Woodhaven School, Inc. approximately $500 in 1985 to inoculate and screen the "direct contact" staff who would work directly with plaintiff.

Dr. Perrillo testified that Woodhaven School, Inc. would need to inoculate and screen only those vocational instructors and aides working directly with plaintiff. Also, a person to fill in for absences and vacations would also need to be inoculated and screened. When Dr. Green toured the Occupational Resources Center, he observed four staff members providing services in the work activities center where plaintiff would probably start his training. Inoculating and screening those four

employees would now cost the school approximately $1000. Dr. Perrillo also suggested that the bus monitor(s) riding with plaintiff to the ORC should also be inoculated and screened. If the monitor(s) were employees other than the vocational aides, some additional staff might require inoculation and screening. There were also three unimmunized clients at the ORC. If their respective funding or referring agencies were not willing to pay for their inoculation, there could be an additional cost of $525 to $600 for the school. Finally, Hassemer testified that Woodhaven School, Inc. experienced an annual turnover of 50% among its vocational aides. Assuming that rate remained constant, the school would need to inoculate and screen 2 or 3 new aides per year at a cost of $400 to $600, to work directly with plaintiff or to be available for back-up.

The costs to accommodate plaintiff would have imposed and will impose no undue financial burden on Woodhaven School. Expenditures of $500 in 1985, approximately $1600 now, and perhaps $400 to $600 per year in the future are not a significant financial burden in light of the school's $1.1 million annual operating budget.

Thus, the Court concludes that plaintiff is an "otherwise qualified"handicapped individual within the meaning of Section 504 of the Rehabilitation Act. Defendants could have eliminated any significant risk and accommodated plaintiff's handicap by inoculating and screening those staff designed to work and have routine hands-on contact with plaintiff. Inoculating and screening those limited numbers of "direct contact" staff and backup staff would have imposed no undue financial

burden on defendants and, therefore, would have been a reasonable accommodation.[2]

E. Attorney's Fees Under Section 794a

Section 794a(b) provides that "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, *in its discretion, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b) (emphasis added). In light of the fact that the Court's remedy in this case will require defendants to expend a considerable amount of money in order to accommodate plaintiff, then the Court, in its discretion, declines to award plaintiff attorney's fees pursuant to Section 794a(b).

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[2] This conclusion is further supported by the fact that institutions for the mentally retarded have a higher degree of the disease of heapatitis B and present the greatest opportunity for the disease to be transmitted. Recognizing this fact, the Missouri Department of Mental Health sought and received an emergency appropriation of $1.2 million from the Missouri Legislature to cover the expenses of the screening and inoculation of DMH employees and clients. While defendants have sought and been refused public funding for its inoculation program, it appears, based on the fact that institutionalized mentally retarded individuals fall within the "high-risk" group of potential carriers of hepatitis B, that the costs associated with the development of an inoculation and screening program represent a "cost of doing business" for private institutions, like that of defendants, which cater to the mentally retarded. If mentally retarded individuals like Dennis Kohl were deprived of the benefits of residential placement and vocational training in private institutions merely because of their status as hepatitis B carriers, then the whole Congressional purpose of the Rehabilitation Act — to develop and implement, through research, training, services, and the *guarantee of equal opportunity,* comprehensive and coordinated programs of vocational rehabilitation and independent living for the mentally retarded — would be thwarted.

Conclusion

In accordance with the foregoing opinion, it is hereby

ORDERED that the Court finds that defendants Woodhaven Learning Center's and Woodhaven School, Inc.'s policy and practice of excluding plaintiff from and denying plaintiff the benefits of their residential and day-training programs violate plaintiff's rights under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. It is further

ORDERED that defendants be permanently enjoined from excluding plaintiff from and denying him the benefits of their residential and day-training programs. It is further

ORDERED that defendants submit to the Court within thirty (30) days from the date of this order a proposed plan for the inoculation and screening of staff and unimmunized clients in accordance with this opinion. This plan must be formulated and implemented expeditiously so that plaintiff may be immediately admitted upon completion of the inoculation and screening of the persons specified in this order. It is further

ORDERED that plaintiff will have twenty (20) days from the date that defendants file their proposed plan in which to file objections to defendants' plans. It is further

ORDERED that each party shall bear their own costs.

/s/ Scott O. Wright
United States District Judge

September 25, 1987.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2627/2644WM

Dennis Kohl, by his parents and guardians, Norbert and Jean Kohl,

Appellees,

v.

Woodhaven Learning Center, a corporation, and Woodhaven School, Inc., a corporation,

Appellants.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

(Filed Jan. 10, 1989)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

January 10, 1989

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-2627/2644

Dennis Kohl, by his parents and guardians, Norbert Kohl and Jean Kohl,

Appellees,

vs.

Woodhaven Learning Center, a corporation, and Woodhaven School, Inc., a corporation,

Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. The petition for rehearing is also ordered denied.

Judge McMillian voted to grant the petition for rehearing; Judge John R. Gibson did not participate in the voting.

May 12, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX E

FEDERAL STATUTES AND REGULATIONS INVOLVED

Federal Statutes

29 U.S.C. § 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be exluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or

agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers; exception

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

FEDERAL REGULATIONS

45 C.F.R. § 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

45 C.F.R. § 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health and Human Services and to each program or activity that receives or benefits from such assistance.

45 C.F.R. § 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub.. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health and Human Services.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any suc-

cessor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs;

respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and

technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

45 C.F.R. § 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agen-

cy, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to

discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of non handicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by the Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.